89-910

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

ALICE CHATHAS and BYRON ELLIS,
Petitioners,

v.

NORBERT SMITH, Individually and as Chief of Police of Village of Evergreen Park, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a lawyer deprived of her right to be free from unreasonable seizure and excessive force when, after she has been fully scanned for weapons upon entry to the courthouse to try a case (and found to be unarmed), two deputy sheriffs physically lift her up and drag or carry her over twenty feet into a darkened jury room, shut the door so a third deputy can frisk her, search her purse, and physically bar her from leaving?

2. Is a civil litigant deprived of his right to be free from excessive force and access to the courts when, upon entry to the courthouse on the day his civil trial is to begin, police officers grab, tackle, punch and pound him, maneuver him into a jury room, stand armed in the doorway to prevent him from leaving, and then cause him to be delivered to a mental hospital to have him committed when commitment under the circumstances would knowingly have violated state law?

3. Is a lawyer defending a village in a civil suit entitled to qualified immunity when he knowingly orchestrates an illegal involuntary admission of the plaintiff in that suit to a mental hospital so that he can deprive that plaintiff of his day in court?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Alice Chathas and Byron Ellis respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to remand this cause to the United States District Court for the Northern District of Illinois for a new trial.

[1] A complete list of the respondents is as follows: Norbert Smith, Thomas Evoy, Carl Bergman, Kenneth Klomhaus, Vincent Ruffalo, James Ross, Carmen DiCarlo, Angeline Chmielewski and Vincent Cainkar.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the district court's entry of a directed verdict for the defendants, by a two-to-one vote, is set forth in the Appendix (*infra,* pp. A - 1 through A - 21). Said opinion is reported at 884 F.2d 980 (7th Cir. 1989).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on September 5, 1989. No petition for rehearing was filed. Petitioners invoke this court's jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

Searches and seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV

§ 1. Citizenship rights not to be abridged by states

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE[2]

Petitioners brought this action for deprivation of their civil rights pursuant to 42 U.S.C § 1983. The district court had jurisdiction under 28 U.S.C. § 1343. On May 5, 1987, the district court entered an order directing verdicts for all defendants after plaintiffs presented their case-in-chief. Plaintiffs filed a motion for new trial on May 18, 1987; it was denied on October 9, 1987. Notice of appeal was filed on November 9, 1987. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. On September 5, 1989, the seventh circuit, by a two-to-one vote, affirmed the district court's order.

History of the Underlying Litigation

Petitioner, Byron Ellis, had been employed as a police officer for the Village of Evergreen Park, Illinois, for ten years, when he learned that his employer had neglected to enroll him in the Illinois Municipal Retirement Fund. He retained petitioner, Alice Chathas, to represent him in an attempt to regain his retirement benefits. In November, 1979, he filed suit against the Board of Trustees of the Village of Evergreen Park, the secretary of the police department pension fund and the clerk of the Village, who was also the local agent for the fund. The village retained

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[2] In reviewing the district court's granting of directed verdicts to all defendants, the court of appeals, as the district court, was obliged to view the evidence and draw all inferences in the light most favorable to the petitioners herein. See e.g. *Bergren v. City of Milwaukee*, 811 F.2d 1139, 1142-43 (7th Cir. 1987).

respondent, Vincent Cainkar, a private attorney, to represent it in the pension litigation.

In the course of the litigation, Chathas received harassing telephone calls, had her brake line cut and had a brick thrown through her garage window. Ellis found that someone removed a storm window from his home and attempted to remove the inner window. Ellis became increasingly more worried. He sought psychiatric advice. His psychiatrist recommended that he remain off work, on disability leave, until his pension case was resolved. Ellis heeded the advice.

In October of 1980, a judge of the Circuit Court of Cook County reinstated Ellis to the retirement fund. The case was then transferred to the Worth Township Courthouse, in Alsip, Illinois, and set for trial at 1:00 p.m. on March 30, 1981, to determine when Ellis became eligible for the benefits. The defendants requested that Ellis be examined by a psychiatrist before trial. On March 19, 1981, Ellis was examined by Dr. Ramesh H. Doshi. Ellis told Doshi he was feeling depressed and having difficulty sleeping and concentrating. He told Doshi about the episodes recounted above. Finally, he told Doshi, "If I felt mistreated or if I felt cornered, I may blow somebody away."

Ellis saw Doshi a second time, on March 21, 1981. At that meeting Doshi recommended that Ellis voluntarily hospitalize himself. Ellis declined and Doshi informed him that he felt obliged to disclose his concerns to Ellis' "intended victims." Later that day Doshi telephoned the Village police department and informed respondent, Sergeant Klomhaus, of Ellis' statement. He told Klomhaus that Ellis was stable but that he had a potential for violence; Doshi did not think the danger was immediate, but that March 30th could be a critical point because of the court date.

Klomhaus wrote a memorandum of the conversation to respondent Smith, the Chief of Police. Smith received it on Monday, March 23rd, and that day contacted Cainkar for guidance.

On March 27th, Cainkar called Smith back and told him that he had spoken with the presiding judge at the Worth

Township Courthouse (Judge Eiserman). The judge arranged for additional security at the courthouse for the 30th. Cainkar called Smith again that day and instructed him to have Doshi fill out a certificate for Ellis's involuntary admission to a psychiatric hospital. On March 28th, Klomhaus brought the certificate to Doshi. Doshi signed it but indicated that he had last seen Ellis on March 19th. Respondent Evoy delivered the certificate to Cainkar's house.[3]

The Arrest

On March 30th, pursuant to the presiding judge's order, respondent, deputy sheriff James Ross, arrived at the courthouse at 9:00 a.m., with a metal scanner. He met with respondent, Vincent Ruffalo, and told him to lock all the doors but one and set up a desk in the rotunda, by the door. He explained that they were there because of a potential problem with Ellis and that they were to observe the trial and report back to the judge.

Shortly thereafter, Cainkar arrived. He informed Ross that the police would be arriving soon to take Ellis to the local mental health center for an involuntary admission for evaluation. Respondents Smith, Evoy and Bergman arrived next. After speaking with Cainkar they stood off to the side so they would not be seen.

Cainkar went to see the judge who was scheduled to hear the pension case (Judge Salerno). He asked the judge to sign commitment papers. The judge refused.

At 11:40 a.m., Chathas and Ellis arrived at the courthouse, ready for trial. They approached the desk and respondent, deputy sheriff Carmen DiCarlo, told Chathas to stop. She did. Two deputy sheriffs scanned her with a metal detector, going over her front, side and back. Then they scanned her purse. Despite Chathas' twice asking why they were doing this, she got no response.

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[3] Illinois law directs that a psychiatrist certifying that a person is in need of involuntary evaluation, must have seen the patient 72 hours prior to admission (Ill. Rev. Stat. Ch. 95 ½, §3-602). Doshi had seen Ellis eleven days before.

Chathas told them that she had to proceed to courtroom 2. DiCarlo stopped her. He and another deputy then took her arms and physically lifted her off the ground, against her will, carried or dragged her over twenty feet across the rotunda, deposited her in a darkened jury room and shut the door. Another deputy sheriff, respondent, Angeline Chmielewski, was waiting there. Chmielewski took Chathas' purse and searched it thoroughly. Then she patted Chathas down. Throughout, Chathas asked why this was happening, but Chmielewski only laughed and said, "I'm going to search."

After Chathas was removed from the rotunda, Ellis was scanned and his briefcase searched. Afterwards Ellis attempted to proceed to courtroom 2. Smith and Evoy called out to him. Ellis kept going and Smith, Evoy and Bergman took off after him. Others joined them. The police all wore guns. Evoy and Bergman grabbed Ellis and started to push and jostle him. Ellis asked whether he was under arrest. No one in the group responded. They told him he had to go with them. Ellis kept heading for the courtroom.

Ross said, "Don't let him in the courtroom." Then he tackled Ellis around the waist and pulled him back. Someone else was pounding Ellis on his lower back and kidney area. Ellis was maneuvered across the rotunda and deposited in the jury room where Chathas was being held.

Chathas told Smith to release her client. Smith told her, "Go F___ yourself." She told Cainkar they were there to conduct a trial and Cainkar said, "I'm not doing any jury trial today. He's going * * * * to Tinley Park [Mental Health Center]." Chathas sought to leave the room but neither Evoy nor Ross would let her pass. Ultimately, Chathas did leave the jury room and went to the library. She picked up a copy of the Illinois Mental Health Code and returned to the jury room with it, telling Cainkar that the requirements of the statute were not being met. Cainkar replied, "I don't care if it is or it isn't." Chathas told him he was violating Ellis' civil rights. To this Cainkar replied, "So what. I don't care. He's going." Finally, Chathas again told him he was breaking the law. And Cainkar replied, "I don't give a damn about the law. He's going. Take him away."

Cainkar told someone not to let Chathas or Ellis out of the room. Smith directed his officers not to let Ellis go. Evoy and Bergman guarded Ellis. Eventually, a police officer from Alsip and two paramedics from the Alsip fire department entered the room. One of the paramedics reported that when he arrived at the courthouse he was stopped by the deputy sheriffs. He saw a lot of policemen and a lot of guns. He was advised that they had "an emotionally disturbed patient" . . . who was "known to be armed and could possibly be dangerous."

The paramedic entered the jury room and observed "a tense atmosphere." There was "a lot of yelling, a lot of hollering." No one identified the patient so he approached the person who appeared to him to be the most upset. He went directly to Chief of Police, Smith. Smith redirected him to Ellis. The paramedic convinced Ellis to accompany him to the hospital.

The Release

Upon arrival at the hospital, the mental health technician on duty asked the paramedics if they had "any paperwork" for Ellis' admission. They had none. Then police officers Klomhaus and Bergman arrived on the scene and presented the facially invalid certificate signed by Doshi. The technician asked the police oficers if they could sign a petition for involuntary admission based on their personal observation of Ellis. Klomhaus responded by reporting an incident of December, 1978, close to three years earlier. At that time Klomhaus had been called to the Ellis home by Ellis' former wife; she had called in and reported that Ellis was in a "highly nervous state and that he had been "sitting on the couch in the living room with his silver gun by his side." After Mrs. Ellis' phone call, Ellis had gone to the basement. Mrs. Ellis was afraid that her husband was suicidal. When Klomhaus spoke to Ellis from the head of the stairs, Ellis told him that if he "or anyone came down and set a foot on the stairs he would blow [him] away."

Klomhaus was not able to report any more recent observation. Nor was Bergman. The technician then spoke privately with Chathas and Ellis to determine if Ellis was in need of hospitalization. Finding no cause to detain Ellis, he released him.

REASONS FOR GRANTING THE WRIT

I.

A LAWYER HAS BEEN DEPRIVED OF HER CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEIZURE AND EXCESSIVE FORCE. THE SEVENTH CIRCUIT IS PLAINLY WRONG IN HOLDING THAT RESPONDENTS COMMITTED NO CONSTITUTIONAL VIOLATIONS IN LIFTING THE LAWYER UP OFF HER FEET, AGAINST HER WILL, CARRYING OR DRAGGING HER ACROSS THE COURTHOUSE, DEPOSITING HER IN A DARKENED JURY ROOM AND SHUTTING THE DOOR SO SHE COULD BE FRISKED, SEARCHED AND RESTRAINED UNDER ARMED POLICE GUARD.

A majority of the seventh circuit held that under the facts presented Chathas was not deprived of her constitutional right against unreasonable seizure and excessive force. To support its conclusion the court very blithely asserted that as a matter of law, in 1981, "the appropriate standard for excessive force claims was unsettled." (A.-18) Using this strange premise as its building block the majority reasoned that respondents did not act unreasonably, that the force exerted was not excessive, and that because petitioners did not sustain serious injury respondents were immune from liability for this conduct because they enjoyed qualified immunity.[4]

Furthermore, the majority of the seventh circuit in this case went on to hold that even under the objective reasonableness standard, now used to analyze excessive force claims, Chathas "did not prove or offer evidence" that the respondents' actions

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[4] Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a two-part analysis exists to determine qualified immunity: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? See also, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986); *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985).

were unreasonable because she never testified that she was willing to proceed voluntarily. (A.-19)

We agree "that not every push and shove would form the basis for a Fourth Amendment claim." (A.-19) However, it stretches the outer limits of dignity to characterize what happened here as a push or shove! What was heaped upon Chathas would have sufficed to raise a constitutional issue if the petitioner had been a shopper in a supermarket. But she was a lawyer — an officer of the court — accosted in a courthouse which she entered to represent a client.

Given the background in which the drama was played, the seventh circuit's analysis is strained beyond credulity. The majority treats it as if it were a case of an adolescent prank gone awry. It is not, as the majority suggests, a garden variety "excessive force" case arising out of a street arrest. To the contrary, Chathas, a lawyer, had every right to enter the courthouse with her client — and every right to enter a courtroom therein to engage in a civil trial. The Fourth Amendment provides her this guarantee: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." It has long since been recognized, in countless decisions of this court, that "The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court,* 387 U.S. 583 (1967). Yet reading the majority opinion of the court below, Chathas was not entitled to this basic constitutional protection.

Even assuming there was legitimate reason to scan Chathas with a metal detector upon her entry into the courthouse, there is no conceivable legitimate explanation for deputies lifting her off the floor against her will and carrying or dragging her over twenty feet across the rotunda into a dark jury room so that she could be patted down by another deputy.[5] Everyone should have known it was wrong. The fact that the seventh circuit hadn't

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[5] No one else entering the courthouse was subjected to such a pat down — not even Ellis, the supposedly dangerous person.

yet handed down *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985) or *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987) doesn't change it. As was aptly stated by Judge Pell, in *Foster v. Zeeko*, 540 F.2d 1310 (7th Cir. 1974):

> The law does not expect police officers to be sophisticated, constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some knowledge of it [citing Glasson v. City of Louisville, 518 F.2d 899, 910 (6th Cir. 1975), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L. Ed. 2d 258 (1976)].

Nor does the fact that there was no case law on point negate Chathas' firmly established constitutional right to be free from unreasonable seizure and excessive force. Chathas' right springs from the constitution, not from case law. By the seventh circuit's analysis, no one could establish a constitutional violation absent a prior construction of the provision, involving similar facts.

Certainly this is wrong.

A jury should have been allowed to determine whether respondents, in furtherance of a conspiracy to deprive Ellis of his right to present his pension case, used excessive force on Chathas so that they could effectuate their plan.[6]

Further, the court of appeals' majority pronouncement, that Chathas offered no evidence that she was willing to go with the deputies voluntarily, is under the circumstances of this case, hard to swallow. Chathas testified she was carried *against her will;* and that despite her requests for information no one would tell her where or why she was being taken. Was this not enough?

We submit, it was.

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[6] There is no question that Chathas was seized. As this court recently stated, in *Brower v. County of Inyo*, 489 U.S. ___, 103 L.Ed.2d 628, 634, 109 S.Ct. ___, quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) "Whenever an officer restrains the freedom of a person to walk away he has seized that person."

II.

A LITIGANT WAS DEPRIVED OF HIS RIGHT TO BE FREE FROM EXCESSIVE FORCE AND ACCESS TO THE COURTS, WHEN AFTER HE WAS SCANNED FOR WEAPONS AND HAD HIS BRIEFCASE SEARCHED UPON ENTRY TO THE COURTHOUSE ON THE DAY HIS TRIAL WAS TO BEGIN, RESPONDENTS GRABBED, TACKLED, PUNCHED AND POUNDED HIM — KNOWING HE WAS UNARMED — TO MANEUVER HIM INTO A JURY ROOM — WHERE HE WAS FORCIBLY HELD — UNTIL HE WAS ILLEGALLY REMOVED TO A MENTAL HEALTH FACILITY FOR AN INVOLUNTARY ADMISSION. PROBABLE CAUSE WAS LACKING.

Ellis' right of access to the court, to settle his dispute, is a hallmark of our society. One of our most sacred rights:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . .granted and protected by the federal constitution.

Chambers v. Baltimore & Ohio R.R.Co., 207 U.S. 142, 148 (1907); see also, *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986).

Moreover, the right of access to the courts does not, we submit, rest on denial of "ultimate access" or a showing of prejudice. (A.-16) On the lower court's logic, if a person acting under color of law, through stratagems, prevented another from securing his rights in a court of law for years — a victim who persevered and ultimately gained access, would have no constitutional claim.

Here, the seventh circuit conceded that under Illinois law, respondents did not have the legal authority to have Ellis involuntarily admitted to a psychiatric facility for an evaluation. The court recognized that *two* judges of the Circuit Court of Cook

County had refused to sign commitment papers for Ellis and "[t]here was some evidence that Ellis could be safely confined within the courthouse." How could this be anything but a "deprivation of any rights privileges, or immunities secured by the Constitution and law." It is not disputed, nor does the court below point to any evidence, that anyone had observed Ellis engage in any behavior that rendered him a danger to himself or others for several years, let alone within the required time frame for involuntary admission set by the state mental health code. Yet the court of appeals went out of its way to weigh the evidence and find that the respondents had probable cause to ambush Ellis and have him forcibly removed from the courthouse and taken to the Tinley Park Mental Health Center. This ruling denigrates our judicial system and creates a stark injustice. Probable cause should have been determined by the jury, not by the district court or the court of appeals.

"Probable cause is a 'fluid concept' — turning on the assessment of probabilities in particular factual contexts." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The existence of probable cause is a question for the jury in a damage suit "if there is room for a difference of opinion." *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc) *cert. dismissed* 478 U.S. 1044 (1986); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986).

There was room for a difference of opinion here. The police in this case did not find themselves in a situation at all like the one in *McKinney v. George* (726 F.2d 1183 (7th Cir. 1984)), upon which the seventh circuit relied. In *McKinney*, the evidence was uncontroverted that on the night of the arrest in question a defendant police officer personally observed the plaintiff to be running naked through the halls of the police station. 726 F.2d at 1188. Also in that case, the plaintiff did not merely exhibit a "potential" for violence; he was actually brandishing knives and otherwise threatening others in the hallway of his apartment building. The other tenants were afraid to go out of their doors.

How does this compare to the situation here, where: (1) Ellis made a potentially threatening comment to a psychiatrist in the confines of the psychiatrist's office; (2) the psychiatrist — who never suggested involuntary admission for Ellis, let alone initiate the same — informed the police of the comment and the police

took no overt action for nine days; (3) no respondent personally observed Ellis to be a danger to himself or others during this time frame; (4) no respondent had even heard of Ellis engaging in any questionable activity during this time period; and (5) most importantly, Ellis successfully passed through the metal scanner at the courthouse so that the respondents knew he was unarmed.

There is no comparison.

In *Bevier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986), the seventh circuit held that the police lacked probable cause to arrest parents for child neglect where: (1) there was an absence of evidence that neglect was knowing or wilful; (2) the police failed to investigate the situation; and (3) the police ignored the opinion of an experienced investigator from the Illinois Department of Children and Family Services that the matter did not rise to a violation of the child neglect statute. In that case, Judge Cummings stated:

> A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether [an involuntary admission is appropriate].
>
> * * * *
>
> Although the police must be allowed some margin of error, a police officer evaluating a situation for probable cause must utilize the means at hand to minimize the risk of error. See 1 LaFave, Search and Seizure [3.2, at 467.

These words could have been written for the case at bar. Yet the seventh circuit conveniently forgot them.

Petitioners submit the respondents conspired to close their eyes to the facts at hand and effectuate the arrest of Ellis. They clearly failed to "utilize the means [available to them] to minimize the risk of error." The question of their good faith belief in the reasonableness of their conduct was for the jury.

Also, there is no support in the law for the holding by that *as a matter of law*, Ellis' potentially threatening statement to

Doshi *eleven* days earlier formed a sufficient basis for the respondents to have conspired to arrest Ellis and cause him to be taken to a mental hospital for observation, especially where there was not a scintilla of evidence that Ellis did or said anything in the interim to reflect an abnormal mental state. The Illinois Mental Health Code does not countenance any such basis for a person's confinement.

The respondent police officers, as well as Cainkar, must be charged with knowledge that under the law they had no probable cause to arrest Ellis and have him carted off to a mental institution. Doshi's certificate was stale and the presiding judge's order providing additional security at the courthouse was appropriately designed to deal with any potential problem that Ellis could present. Any uncertainty surrounding this issue should have been resolved once it was determined that Ellis was unarmed.

Moreover, the deputy sheriffs had to have known they were far exceeding their authority when they assisted in this shanghai. The deputy sheriffs, according to Ross, had been directed to scan all courthouse entrants, observe the trial and report back to the judge — not beat Ellis and hold him under guard.

In still other words, the standard of immunity is whether officers of reasonable competence could disagree on whether the arrest was reasonable. *Malley v. Briggs*, 475 U.S. 335 (1986). In this case, a question of fact existed as to whether the respondents were under a duty to make further inquiries as to Ellis' allegedly dangerous propensities or take alternative measures to protect themselves from him. It cannot be deemed coincidental, or ignored, as the district court and the court of appeals did, that the courthouse from which Ellis was abducted was the forum set for trial of his pension suit, or that some of his abductors were the defendants in that case. And the proffered suggestion that the assemblage of so many peace officers was coincidental is but an affront.

III.

A CONFLICT AMONG THE CIRCUITS EXISTS AS TO WHETHER A PRIVATE LAWYER, DEFENDING A VILLAGE IN A CIVIL SUIT, IS ENTITLED TO IMMUNITY WHEN HE WRONGLY ORCHESTRATES AN INVOLUNTARY ARREST OF THE PLAINTIFF IN A COURTHOUSE AND HAS HIM CARTED OFF TO A MENTAL HOSPITAL ON THE DAY PLAINTIFF'S CASE WAS SET FOR TRIAL.

With a quick stroke of the pen, the court of appeals skirted another issue of utmost importance — whether a private attorney, defending a municipality in a civil suit, is entitled to immunity for his wrongful conduct. "The village hired Vincent Cainkar; a private attorney in civil practice to represent it in the pension case." (A.-3) This was stipulated. The record leaves no question about the overzealousness with which he undertook the defense of that suit. He sought the advice of two judges on the legality of having Ellis committed. Failing that, he masterminded the coup in question. Yet the court of appeals stated:

> Because the only allegation against Cainkar was that he conspired with the other defendants to violate the plaintiffs' constitutional rights and because the other defendants cannot be found liable, Cainkar also cannot be liable. Although the district court held that Cainkar was entitled to absolute immunity, we need not decide this issue because Cainkar, like the other defendants, either did not violate anybody's constitutional rights or was qualifiedly immune.

(A.-19) Cainkar had everything to do with it. He carried the baton. In relegating Cainkar's part in this travesty to triviality, the court of appeals also further muddies an issue that confounds the circuits; an issue that has never been resolved

by this court — that is to say, whether a private party, acting under color of state law, is entitled to any immunity.[7]

The question of availability of qualified immunity for private persons acting under color of state law was expressly left open by this court in *Lugar v. Edmunson Oil Co.*, 457 U.S. 922 (1982).[8] Since that time the United States Courts of Appeal for the Sixth and Ninth Circuits have ruled that there is no such immunity. *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988); *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983). The Eighth Circuit has held to the contrary. *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983). So has the Fifth Circuit, the Tenth Circuit and the Eleventh Circuit. *Folsom Investment Co. vs. Moore*, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982); *DeVargas v. Mason*, 844 F.2d 714 (10th Cir. 1988); *Jones v. Preutt & Mauldin*, 851 F.2d 1321 (1987). The district court for the district of Delaware has also allowed for such immunity. *Shipley v. First Federal Savings and Loan*, 703 F.Supp. 1122 (D. Del. 1988). This court should, in this case, resolve the conflict and provide the lower courts with guidance. And, we submit, hold there is *no* immunity.

But even if this court were to hold that private individuals could be protected by immunity — either absolute (district court) or qualified (seventh circuit) — there is no basis for any immunity to be accorded Cainkar under the circumstances here. Far from showing that Cainkar had a reasonable good faith belief that the course of conduct he had undertaken was proper under state law, the evidence showed that he had a blatant disregard for the law and Ellis' rights — and implicit in his remarks and conduct was that he knew he was violating the constitution and the laws. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 194n 12 (1984).

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[7] The court of appeals, in footnote 4 to its opinion, noted it did not have to reach the question. However, this seems to be somewhat at odds with its oblique holding, which we quote above, that "Cainkar . . . was qualifiedly immune."

[8] Prior to *Lugar*, the First Circuit had held that private actors acting under state law were not entitled to immunity. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978)

Even if Cainkar had held a reasonable belief that Ellis posed a danger to his clients, that belief should have vanished following the searches. Ellis was found to be unarmed and the presence of the extra contingent of Cook County deputy sheriffs at the courthouse should have allayed any reasonable person's fears of potential violence. Continuation of even a lawful arrest violates the Fourth Amendment when additional facts are learned which dissipate earlier probable cause. *Bevier v. Hucal*, 806 F.2d 123 (7th Cir. 1986). Cainkar should have allowed the trial to proceed as scheduled rather than abort it through a farcical hijack.

Finally, even if it could be said that the police may not have known they were violating the law, the same cannot be said for Cainker. Cainker was a lawyer. He had consulted judges on the question even before March 30th. On the day in question, the trial judge refused to sign an order for the commitment after the arrest of Ellis. Chathas, when she was allowed to leave the jury room, returned with the Illinois Mental Health Code and told Cainkar what it read:

> A peace officer may take a person into custody and transport him to a mental health facility when, as a result of his personal observation, the peace officer has reasonable grounds to believe that the person is subject to involuntary admission and in need of immediate hospitalization to protect such person or others from physical harm. . . Upon arrival at the facility, the peace officer shall complete the petition under section 3-601.

(Ill. Rev. Stat. Ch. 95½, § 3-606)

Cainkar was not a "*peace officer*"; notwithstanding, he conducted himself as one. Moreover, section 3-602 directs:

> The petition ***shall be accompanied by a certificate*** executed by a physician . . . which states that the respondent is subject to involuntary admission and requires immediate hospitalization. ***The certificate shall indicate that the physician . . . personally examined the respondent not more than 72 hours prior to admission . . .*** (Emphasis supplied.)

At the risk of some redundancy, Cainkar appreciated that he needed a certificate to accompany the petition. He attempted to obtain one. He telephoned Chief Smith on March 27th and requested that he have Dr. Doshi fill out such a certificate. And he arranged to have the certificate delivered to his home the following day. The certificate showed, however, that Dr. Doshi had examined Ellis on March 19th, a full eleven days before the arrest.

Thus, Cainkar clearly knew that he was acting illegally when he set up the arrest of the petitioners and the transport of Ellis to a mental hospital.

CONCLUSION

The opinion in this case is a step backward in the construction of the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. If permitted to stand, it will provide precedent that will deprive these plaintiffs as well as others of basic constitutional rights. It should be reversed.

Wherefore, for all of the foregoing reasons, petitioners Alice Chathas and Byron Ellis pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, directing it to remand this cause to the United States District Court for the Northern District of Illinois for a new trial.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-2821

ALICE CHATHAS and BYRON ELLIS,

Plaintiffs-Appellants,

v.

NORBERT SMITH, Individually and as
Chief of Police of Village of Evergreen Park, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 3908—Paul E. Plunkett, *Judge*.

ARGUED APRIL 13, 1988—DECIDED SEPTEMBER 5, 1989

Before MANION and KANNE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

MANION, *Circuit Judge*. Plaintiff-appellant Byron Ellis, a former police officer with the Village of Evergreen Park, assisted by his lawyer, plaintiff-appellant Alice Chathas, sued the Village and various responsible officials to secure increased pension benefits. On the day the trial was supposed to begin, the various defendants—deputy sheriffs, Village officers, and the lawyer representing the Village—attempted to involuntarily commit Ellis to a mental institution. The mental hospital found that Ellis did not meet its admission standards. Later he won the pension

benefits he originally sought. Ellis and Chathas subsequently sued the various defendants under 42 U.S.C. §1983 to redress alleged deprivations of their rights under the Fourth and Fourteenth Amendments.

After plaintiffs presented their evidence to a jury, the district court granted defendants' motion for a directed verdict. Plaintiffs appealed. Because we agree with the district court that the plaintiffs did not present evidence sufficient to show any deprivation of any constitutional right, we affirm.

I. NATURE OF THE CASE[1]

In 1968, plaintiff-appellant Byron Ellis joined the Village of Evergreen Park Police Department (Police Department) in Evergreen, Illinois, as a police officer. For ten years, Ellis performed his duties quietly. In 1978, however, Ellis accidentally shot his niece at his home. On December 11, 1978, Sergeant Klomhaus of the Police Department received a call from the former Mrs. Ellis that—in the words of the sergeant's contemporaneous internal report—her husband was in a "highly nervous state," as evidenced by the fact that he "had been sitting on the couch in the living room with his silver gun by his side." Mrs. Ellis stated she feared that her husband would kill himself. By the time Klomhaus and two other officers arrived at his house, Ellis had gone to the basement. According to his memorandum, Klomhaus "spoke to Detective Ellis from the head of the stairs and received the reply that if we or anyone came down and set a foot on the stairs he would blow us away."

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[1] In evaluating a motion for a directed verdict this court must, as must a trial court, view the evidence and make all inferences in the light most favorable to the nonmoving party. If reasonable jurors could differ as to the conclusions to be drawn from the evidence, the jury must hear the case. *See, e.g., Bergren v. City of Milwaukee*, 811 F.2d 1139, 1141-42 (7th Cir. 1987).

Less than a year later, Ellis learned that—contrary to what he had assumed—the Police Department had not enrolled him in the Illinois Municipal Retirement Fund (the Fund). To assist him in becoming enrolled, Ellis retained plaintiff-appellant Alice Chathas to represent him. In November, 1979, Ellis sued, in Illinois state court, the Fund, a local agent for the Fund, the Board of Trustees of the Village of Evergreen Park, and Carl Bergman, who was an Evergreen police officer and the Fund's secretary. The Village hired Vincent Cainkar, a private attorney in civil practice, to represent it in the pension case. The parties have stipulated in the pretrial order in this action that "Cainkar was an attorney for the Village of Evergreen Park."

Ultimately, the pension case was set for a hearing on pending pretrial motions and for possible trial on Monday, March 30, 1981. Circuit Court Judge Joseph Salerno would preside in the Worth Township Courthouse in Alsip, Illinois. By this time, Ellis was no longer working and had already been declared eligible for disability and pension benefits from the Fund (thus narrowing the issues for trial to when he became eligible for those benefits). On March 12, 1980, while on duty, Ellis had admitted himself to a hospital emergency room for tests. Ellis stated to hospital personnel that he was working without any disability benefits and felt increasingly worried. The hospital referred Ellis to Dr. Sokhey, a psychiatrist. Dr. Sokhey recommended that Ellis remain off work until the pension case was resolved. Ellis saw Dr. Sokhey for more than four months. Ellis followed Dr. Sokhey's advice and did not return to the Police Department. In response to an inquiry by Police Chief Norbert Smith, Chathas stated that Ellis was absent and undergoing treatment because he was "under significant physical and emotional strain and apprehension." Subsequently, Ellis filed a claim for worker's compensation in which he claimed anxiety, neurosis, and depression as his injuries.

To verify Ellis's claim that he was mentally disabled, the Fund had requested that Dr. Ramesh Doshi, a psychi-

atrist, examine Ellis. Dr. Doshi examined Ellis on March 19, 1981. As Doshi testified, Ellis told him that he was depressed, was not sleeping, and was experiencing distress. Ellis also told Doshi that he felt that Village officials and Police Department officers were conspiring against him because of the pension litigation. As part of this conspiracy, Ellis believed that those people were threatening his life and his attorney's life. According to Doshi, Ellis told him that "[h]is attorney's life had been threatened, I guess the brake lines were cut; his windows were broken . . . ; he also felt that his life was jeopardized by the department." Ellis told Doshi that he felt threatened by what he was experiencing and that "[i]f I felt mistreated or if I felt cornered, I may blow somebody away." Ellis confirmed the essential details of his visit to Doshi; Ellis testified that he told Doshi that "[i]f someone was to make and be a threat to my life that I would take the appropriate amount of action to terminate the situation even if the action meant taking their life, to kill them."

Dr. Doshi concluded that Ellis was paranoid and depressed and that Ellis's "insight and judgment are grossly impaired due to delusional state." Because Dr. Doshi was concerned about the threats that Ellis had made regarding Village officials and Police Department officers, Doshi decided to examine Ellis for a second time on Saturday, March 21, 1981. After that examination, Doshi recommended to Ellis that he voluntarily admit himself to a mental hospital. Ellis refused. Dr. Doshi then advised Ellis that he felt obligated to let Ellis's potential victims know about Ellis's threats. Subsequently, Doshi telephoned Chathas to ask her to convince Ellis to enter a mental hospital. Doshi at that time told Chathas he would inform Ellis's potential victims about Ellis's threats.

Sometime that afternoon, Doshi called the Police Department because he believed there was a "serious potential for serious harm to one or more people anticipating the court date coming up for the pension decision." His call was referred to Sergeant Klomhaus. Dr. Doshi relayed

to Klomhaus what Ellis had said and told Klomhaus that although Ellis was not immediately dangerous, he did have a potential for violence. In this regard, Doshi told Klomhaus that the upcoming March 30 court date could trigger that violence. Doshi warned Klomhaus that Ellis should not possess any weapons.

Later, Klomhaus wrote a memorandum to Chief Smith describing his telephone call with Doshi. That memorandum from Sergeant Klomhaus provided in pertinent part as follows:

> The doctor is advising the police because of the potential for homicide that he feels Byron Ellis exhibits, Officer Ellis commented words to the effect that if those were all conspiring against him don't back off he's going to blow them away .... The doctor feels that Byron is in need of immediate hospitalization, and with the attorney attempted to talk to Byron into going into the hospital. Byron refused.
>
> The doctor described Byron as a time bomb who, although appears to be stable now, can go off at any time .... The doctor further feels that the next court date on his suit ... could be the critical point, especially if the decision is against Byron .... The doctor further related that in order to commit someone such as Byron a petition must be signed, and anyone can sign it. This, with two doctors' statements that a person is in need of psychiatric help, will allow a judge to sign commitment papers.
>
> The doctor advised that the reason for the call is because he feels that there is great potential for something bad to happen and he feels bound by law to report it.

Chief Smith received this memorandum setting forth Dr. Doshi's warnings on Monday morning, March 23. In addition, Chief Smith knew that Ellis had approximately fourteen guns in his home, that he made his own bullets, and that he kept gunpowder at home. Smith also knew that Ellis was a sharpshooter. Given these facts, as Lieutenant

Bergman would later testify, the Police Department wanted to avoid a confrontation with Ellis at his home, where he would have access to that arsenal.

Chief Smith called attorney Cainkar for guidance. Cainkar responded to Chief Smith on Friday afternoon. He told Chief Smith that he had spoken with Judge Eiserman, the Fifth District's presiding judge, and that Judge Eiserman had ordered additional security for the courthouse on March 30. On that Friday, Judge Eiserman had asked defendant James Ross, a Cook County deputy sheriff, to make sure that the sheriff's office provide extra security for the courthouse by setting up a desk and metal scanners at the entrance to the courthouse. In addition, Judge Eiserman ordered that everybody who entered the courthouse would be subject to a full search to ensure that no one would be armed.

Later that afternoon, Cainkar called Smith again and asked him to have Doshi fill out a certificate for Ellis' involuntary admission to a psychiatric hospital. Smith in turn instructed Klomhaus to get in touch with Doshi. Klomhaus contacted Doshi and told him that the legal department of the Village had asked him to sign a certificate for involuntary hospitalization.

The next day, Saturday, March 28, Klomhaus brought the certificate to Doshi. Doshi completed the certificate, indicating that he had examined Ellis on March 19. Dr. Doshi concluded with the following: "If patient feels under distress or if he loses control, situation could prove dangerous to others and even himself."

On Monday, March 30, Deputy Sheriff Ross arrived early at the courthouse, where he met defendant Vince Ruffalo, another deputy sheriff. Ross ordered Ruffalo to lock all the doors except the front one and to set up a desk at the front door. Ross told Ruffalo that their job was to see if any problem developed with Ellis and to report back to Judge Eiserman. Cainkar arrived next and instead informed Ross that there would be no trial. Instead, police officers would soon arrive to take Ellis to

the Tinley Park Mental Health Center for "an involuntary admission for evaluation."

Next, Chief Smith arrived along with officers Evoy and Bergman. The sheriff's deputies asked them to remove the bullets from their guns, which they did. Afterwards, the three police officers met with Cainkar and Deputies Ross and Ruffalo. Ross and Cainkar told the officers that Judge Salerno, the presiding judge, did not want Ellis in his courtroom. The group decided to stop Ellis once he entered the building and to take him into custody for this psychiatric evaluation. The police officers then stood off to the side.

After chatting with the police officers, Cainkar, armed with Dr. Doshi's certificate, went to Judge Salerno's chambers and asked him to sign papers to involuntarily commit Ellis. Judge Salerno refused.

Subsequently, at around 11:40 a.m., Chathas and Ellis arrived. Chathas walked through the initial search station set up by the sheriff's deputies. There, DiCarlo and another deputy sheriff operated a hand-held metal scanner which scanned Chathas as she walked through. According to Chathas' testimony, she told the deputies that she was going to the courtroom. DiCarlo stopped her. He and the other deputy sheriff physically lifted her off the ground, carried her twenty feet across the rotunda, deposited her inside a jury room, and shut the door. A female deputy sheriff, Angeline Chmielewski, waited in the jury room. She searched Chathas' purse and frisked her.

After walking through the metal scanning, Ellis started towards the courtroom. Smith and Evoy called out to Ellis. Ellis ignored them. Smith, Evoy and Bergman then ran towards him and grabbed him. They started pushing and jostling him. At this point, according to Ellis, Deputy Sheriff Ross screamed, "Don't let him in the courtroom." Ross then tackled Ellis around the waist and pulled him back. Someone else was punching Ellis on his lower back. Chathas testified that she opened the door to the jury room and saw Smith, Evoy, and Bergman trying to force Ellis into the jury room. When Chathas

emerged from the jury room and saw the police officers dragging Ellis across the hall, she told Smith to let go of her client. She testified that Smith responded, "Go f--- yourself." Smith, Evoy, and Bergman maneuvered Ellis across the rotunda of the courthouse into the jury room.

The police officers entered the jury room with Ellis. Sheriff's deputies were already present. Chathas testified that she advised Cainkar, who was in the room directing the others, that they were there for a trial. Cainkar allegedly replied, "I'm not doing any jury trial today. He's going . . . to Tinley Park." Cainkar advised Chathas that he was authorized to take Ellis to Tinley Park by § 3-606 of the Illinois Mental Health Code, which provides in pertinent part as follows:

> A peace officer may take a person into custody and transport him to a mental health facility when, as a result of his personal observation, the peace officer has reasonable grounds to believe that the person is subject to involuntary admission and in need of immediate hospitalization to protect such person or others from physical harm. Upon arrival at the facility, the peace officer shall complete the petition under Section 3-601.

Cainkar ordered that Ellis not be let out of the room. Evoy and Bergman closely guarded Ellis. Ellis remained in the jury room for at least thirty minutes.

Chathas testified that in addition to restraining Ellis, the police officers and deputy sheriffs also restrained her. In particular, Chathas testified that Lt. Evoy and Deputy Sheriff Ross blocked the door to the jury room. But Chathas admitted upon cross-examination that she was able to leave the jury room when she wished. In fact, she left to obtain a copy of the Illinois Revised Statutes to check Cainkar's authority to commit a person involuntarily for psychiatric evaluation. Chathas further admitted that nobody touched her after the sheriff's deputies brought her to the jury room. Chief Smith, for example, did not physically hinder her; his only sin was that, according to Chathas, "I needed to speak with my client

and he would not cooperate in permitting me some privacy to maintain the integrity of the attorney-client relationship."

Chathas walked to a law library in the courthouse and returned with a copy of the Mental Health Code. After reading § 3-606 she told Cainkar that the statute did not apply. According to Chathas, Cainkar replied that he did not care; Ellis was going to the hospital even though there was no court order forcing him to go. When Chathas warned him that he was violating Ellis' civil rights, Cainkar allegedly responded, "So what. I don't care. He's going." When Chathas repeated that he was breaking the law, Cainkar reportedly responded, "I don't give a damn about the law. He's going. Take him away." When Chathas again repeated that he was violating Ellis' civil rights, Cainkar emphatically retorted, "He has no rights; he has no rights. He's going."

Ultimately, an Alsip police officer and two paramedics from the Alsip Fire Department arrived. An Evergreen Park police officer told one of the paramedics that they would find in the jury room "an emotionally disturbed patient . . . who was known to be armed and could possibly be dangerous." Ellis was sitting peacefully on a chair in the jury room; indeed, the paramedics initially walked toward Chief Smith. The paramedics convinced Ellis to accompany them to the Tinley Park Mental Health Center. Chathas voluntarily accompanied Ellis and the paramedics.

When they arrived at Tinley Park, Donald Warmack, a Mental Health Specialist II working in the admissions department, asked the paramedics if they had any paperwork to admit Ellis. They did not. Shortly afterwards, Klomhaus and either Bergman or Evoy (there is a dispute in the record about that) arrived and presented Warmack with the certificate signed by Doshi. Warmack believed the certificate to be invalid because the certifying physician had not examined the patient within the previous 72 hours. Warmack returned the certificate. When Warmack asked the officers if they had personally observed any be-

havior upon which a petition could be based to indicate that Ellis was a danger to himself or to others, Klomhaus responded that they had not. After speaking with Ellis and Chathas, Warmack saw no reason to hold Ellis for evaluation at Tinley Park and allowed him to leave. Ellis had been at Tinley Park for approximately 45 minutes. While it is unclear when he returned to the courthouse, he ultimately won the pension litigation.

II. NATURE OF THE PROCEEDINGS

On July 13, 1981, Ellis and Chathas brought this action pursuant to 42 U.S.C. § 1983. Plaintiffs sought damages for the alleged deprivation of their Fourth, Sixth, and Fourteenth Amendment rights.[2]

Several years later, on May 5, 1987, the district court directed a verdict in favor of all defendants after plaintiffs had closed their case. The court held that defendants did not violate the plaintiffs' constitutional rights and that, in any event, defendants were entitled to qualified immunity because there was no evidence to suggest that defendants did not believe in good faith that their actions were constitutional.

Given the multiplicity of plaintiffs and defendants, we now set forth how the district court viewed the causes of action by first Chathas and then Ellis against each set of defendants with differing factual or legal issues.

Chathas v. DiCarlo: The trial court credited Chathas' testimony that DiCarlo and another deputy lifted her off her feet and either dragged or carried her to the room across the rotunda in which Chmielewski waited, but held that "[t]his would go not to a Fourth Amendment claim, but to an excessive force claim." The court then expressly relied on the standards for excessive force as set forth in *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985) to reject Chathas' claim.

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[2] Plaintiffs have since abandoned their Sixth Amendment claim.

Chathas v. Chmielewski: The court also found that Chmielewski searched Chathas. The court found, however, that Judge Eiserman's security order included pat-downs, and that pat-downs could only be done by a female officer in the privacy of another room. The court found that the fact that Chmielewski also searched Chathas' purse was also proper since the purse could not be thoroughly searched with the hand scanner and all items—according to Judge Eiserman's orders—had to be checked for weapons.

Chathas v. Ross and Ruffalo: The court found that there was no evidence that Ross or Ruffalo detained or seized Chathas in any manner. While Ross blocked the door to the jury room, Ruffalo was in the jury room at all times. Chathas admitted at trial that she was able to leave when she wanted. Thus, there could be no claims against Deputies Ruffalo or Ross.

Chathas v. the police officers: The court found that there was no evidence to suggest any interaction between Chathas and the police officers. Once Chathas was searched in the jury room, there was no evidence showing that she was in any way restrained or detained. According to Chathas' own testimony, she was free to leave the jury room when she wanted, and in fact went to retrieve the statute book.

Ellis v. Chmielewski: Ellis presented no evidence regarding Chmielewski or that he even had any contact with her.

Ellis v. DiCarlo: DiCarlo merely used the hand-held metal scanner to search Ellis, and this was done pursuant to Judge Eiserman's order.

Ellis v. Ross: Ross helped the Evergreen Park police officers subdue Ellis, but that this was within the scope of Judge Eiserman's order to maintain security. There was no evidence of excessive force (again presumably under the *Gumz* standard).

Ellis v. Ruffalo: While Ruffalo was in the same room with Ellis, there is no evidence suggesting that he did anything.

Ellis v. Cainkar: The court stated that there was a "strong argument" to be made that Cainkar had absolute immunity for his conduct in instigating the involuntary commitment proceedings, but did not reach whether Cainkar had either qualified or absolute immunity. Rather, the court relied upon the seminal case of *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984). In *McKinney*, this court held that the Fourteenth Amendment permits the police to arrest somebody and to take him to a mental hospital rather than to jail him if they have probable cause to seize him.

The district court found that probable cause to send a person to a mental hospital exists when the police have reason to believe that the person poses a danger either to himself or to others. The district court's key finding is as follows:

> Ellis has failed to present evidence that would allow a reasonable jury to conclude that Cainkar and the Evergreen Park police officials did not have probable cause to take Ellis into custody and to transport him to Tinley Park Mental Hospital for 24-hour emergency observation.

The court emphasized that the provisions of the Illinois Mental Health Code are immaterial to the constitutionality of the conduct if the police have probable cause to take someone into custody.

The court then relied upon the Fourth Amendment to explain that the lesser the intrusion upon the individual, the lower the showing that must be made to impose this intrusion. As the court held, the intrusion imposed on Ellis—transport and detention for a maximum 24-hour period—is much less than an involuntary admission which could last much longer. The court then found that "[e]ven if the Evergreen Park police were not acting with probable cause, Ellis has not presented any information which

would tend to disprove that they were objectively acting in good faith upon the belief that they had probable cause to take Ellis into custody for observation."

The court found that Judge Salerno's refusal to sign the papers shows that the judge had not observed any aberrant behavior, not that the police could not take Ellis into custody based upon Dr. Doshi's statements. The court concluded:

> Such a threatening statement conveyed to the police by Dr. Doshi is sufficient for the Evergreen Park Police Department as a matter of law to seize him and bring him in for observation. At least the Evergreen Park Police people did not know that they were violating any of Ellis' constitutional right in taking that course of action.
>
> Cainkar was acting in the good faith belief that the course of conduct he was recommending was proper under state law. Moreover, in relying on Dr. Doshi's statements and recommendation that Ellis be hospitalized, Cainkar was acting objectively reasonably.

After the plaintiffs unsuccessfully moved for a new trial, they filed timely a notice of appeal.[3]

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[3] Plaintiffs did not file a notice of appeal as to defendant Evoy. Subsequent to oral argument in this matter, on June 1, 1988, a panel of this court held the appellant's failure to name Evoy to be corrected by a letter to his counsel and that this amendment would be allowed under the All Writs Act, 28 U.S.C. § 1651. *Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir. 1988). In *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988), the Supreme Court subsequently held that naming the appellants is a jurisdictional requirement which cannot be waived even for good cause shown and that a court of appeals does not have jurisdiction over the appeal of an unnamed appellant. But the *Torres* decision only applies when a particular appellant is not named, not a particular appellee, and is based upon Fed.R.App.P. 3(c), which requires that appellants be named but does not require that appellees be specified. *See District of Columbia Nurses' Ass'n v. District of Columbia*, 854 F.2d 1448 (D.C. Cir. 1988).

III. ANALYSIS

Plaintiffs alleged that the defendants, individually or collectively in a conspiracy, deprived them of three constitutional rights: an interest in not being committed to a mental institution in violation of state law, access to the courthouse, and being free from excessive force.[4] Plaintiffs allege that the defendants did not comply with the provisions of the Illinois Mental Health Code in committing Ellis. In particular, plaintiffs assert, and presented evidence at trial to show, that the physician's certificate which the defendants presented was outdated.

If the issue were whether defendants complied with the governing state law, then we would have to reverse the district court's grant of a directed verdict. However, §1983 only provides a remedy for federal law violations. As Ellis was not actually committed, he can at most allege that the defendants, in particular the Evergreen Park police officers, seized him without probable cause in violation of the Fourth Amendment. Under this theory, however, which is the only theory available to plaintiffs, if the defendants had probable cause, this would be an absolute defense to plaintiffs' claim. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1344 n.10 (7th Cir. 1985).

The district court found that the defendants had probable cause to take Ellis into custody and to transport him to the Tinley Park facility for 24-hour emergency observation, or at the very least had a good-faith belief that they had probable cause. The evidence that plaintiffs presented at trial can lead only to this conclusion. Probable cause arises "at [the] moment the facts and circumstances

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[4] In the pretrial order, the parties stipulated that Cainkar was the Village attorney. Under Fed.R.Civ.P. 16, what is stipulated in the pretrial order governs the future course of litigation. Thus, this court need not reach in this case whether a private individual can be liable under §1983 and, if so, what immunities he may assert.

within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). A police officer need not personally witness the behavior giving rise to the probable cause—even if there must be personal observation according to a state statute—and can rely on another officer's direction or a reliable informant (such as Dr. Doshi). *See, e.g., Karr v. Smith*, 774 F.2d 1029, 1031-32 (10th Cir. 1985). If there is probable cause, it is irrelevant if the suspect turns out to be noncommittable. The arrest is still legal. *See Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 200 (7th Cir. 1985); *McKinney, supra*, 726 F.2d at 1187.

Where the facts are undisputed, a court may determine whether probable cause existed. *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985). There is every indication that the police reasonably believed Dr. Doshi's worries to be true. *See McKinney, supra*, 726 F.2d at 1187. Plaintiffs acknowledge in their opening brief that "[h]ad Ellis and/or Chathas walked into the courthouse brandishing guns or knives or threatening to 'blow away' the defendants, the defendants would have been justified in detaining them and in having one or both of them involuntarily admitted to a mental health hospital."

There was some evidence that Ellis could be safely confined within the courthouse. By the time the police confronted Chathas and Ellis, they already knew that Ellis was not armed and thus that he was not immediately dangerous. In addition, there was extra security at the courthouse. Yet that is not what probable cause requires. Rather, probable cause requires merely information sufficient to warrant a prudent police officer to believe that Ellis was dangerous. The evidence introduced by plaintiffs shows that Ellis had had several previous incidents in which he had used firearms when upset, including an incident in which he shot his niece and an incident in which he held the police officers at bay in his basement.

In addition, Ellis had already received or was receiving psychiatric treatment from several sources. In terms of protecting both the safety of the officers and Ellis, it makes no difference whether his latest threat to "blow away" the defendants was made in the courthouse or a week before. Probable cause arose when the officers learned of the statements Ellis made to Doshi.

In this regard, the failure of the defendants to follow the procedures set forth in §§3601 and 3606 of the Illinois Mental Health Code does not by itself deprive Ellis of any liberty interest. A state-created procedural right is not itself a liberty interest. *McKinney, supra*, 726 F.2d at 1190. The only constitutional question is whether the police had probable cause within the meaning of the Fourth Amendment and on that question a reasonable juror could only conclude that they did.

Plaintiffs next interpose a "right of access." We agree with plaintiffs that access to the courts is part of our sacred heritage. But they do not specify where in the Constitution this right of access comes from. The right of access as the Supreme Court defines it is "a right to sue and defend." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Assuming the continuing validity of a substantive right of access to the courts, *see, e.g., Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986), and even assuming a delay of access may be a constitutional deprivation, here plaintiff has not alleged in any fashion that he was prejudiced by the delay. Plaintiff does not allege how long his case was delayed, and does not allege how he was prejudiced. Indeed, we question whether he was prejudiced at all, for he ultimately won all of the pension benefits he sought. Even under this most broad reading, depriving the plaintiff of ultimate access is essential for plaintiff to allege and prove, and tellingly, plaintiff has not done so here.

Finally, plaintiffs allege that the defendants used excessive force in bringing Chathas into the jury room and Ellis to Tinley Park. The district court analyzed this issue under the standard set forth in *Gumz v. Morrissette*, 772

F.2d at 1396. Under the *Gumz* test, a state officer's use of force in an arrest is unconstitutional if it (1) caused severe injuries; (2) was grossly disproportionate to the need for action under the circumstances; and (3) was inspired by malice or shocked the conscience. 772 F.2d at 1400. We agree with the district court that the evidence presented by plaintiffs does not present sufficient facts to support a claim that any of the defendants violated the *Gumz* test. They have neither proven a severe injury nor malice on the part of any of the defendants in administering the alleged excessive force. In addition, a jury could not reasonably find from either Chathas' or Ellis' testimony that the use of force was grossly disproportionate. Simply put, while Chathas and Ellis testified to the force applied, they did not testify at all to the circumstances. Chathas did not testify as to whether she was willing to go to the jury room voluntarily, and indicated that her only goal was to get into the courtroom. The officers appear merely to have directed her to the jury room. Ellis testified that he tried to run away from the officers, and thought that if he could make it into the sanctuary of the courtroom, he would be provided with a refuge from the pursuing officers. Thus, and this is a point to which we will return, the plaintiffs have not shown that the force used by the defendants was disproportionate to the circumstances. Under all three elements of the *Gumz* test, defendants did not use excessive force.

Subsequently, this court overruled *Gumz* and outlined a new standard for excessive force in arrest cases. See *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987). Under *Lester*, we analyze excessive force under the Fourth Amendment, and find force to be excessive where it is unreasonable under the circumstances. The Supreme Court in *Graham v. Connor*, 109 S.Ct. 1865 (1989) recently endorsed the "objective reasonableness" standard under the Fourth Amendment, which is the same standard enunciated in *Lester*.

However, we had decided neither *Gumz* nor *Lester* at the time the defendants allegedly used excessive force

(1981). At that time, the appropriate standard for excessive force claims in this circuit was unsettled.[5] The focus of our disagreement with the dissent seems to be confined to whether the plaintiffs made a prima facie case for excessive force (Ellis) and unreasonable seizure (Chathas) based on the standards which were clearly established in 1981. While Ellis claims he was punched or pummeled, and Chathas claims she was lifted or dragged, neither claim any injury. In 1985 we decided *Gumz v. Morrissette* which required, among other things, severe injury and malice or force which shocked the conscience. What the plaintiffs describe falls far short of the *Gumz* standard. We cannot assume a more lenient standard existed before *Gumz* nor can we assume the defendants should have anticipated the objective reasonableness standard announced when *Lester v. City of Chicago* overruled *Gumz* in 1987.

Qualified immunity protects the defendants for their acts in 1981. If the hypothetical Evergreen Park officer had opened a law book in 1981, he would not have been unreasonable in concluding that conduct that did not violate the standard *Gumz* ultimately adopted would not violate the Constitution. And as the district court correctly found,

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[5] In 1982, this court held in *Blake v. Katter*, 693 F.2d 677, 682 (7th Cir. 1982), that "an allegation of excessive force during an arrest is cognizable under §1983." In *Blake*, we did not set forth any particular standard for evaluating excessive force in arrest claims but we did cite *Courtney v. Reeves*, 635 F.2d 326 (5th Cir. 1981), a case that treated excessive force in arrest as violating the Fourteenth Amendment due process clause. At the time this court decided *Gumz*, most courts analyzing excessive force claims analyzed those claims as Fourteenth Amendment violations. See *Gumz*, 772 F.2d at 1399 and the cases it cites. As we noted in *Gumz*, *id.* at 1400, three circuits had already adopted the three-part test for analyzing excessive force claims that *Gumz* ultimately adopted. Two of these cases arguably involved excessive force in an arrest; none of these cases differentiated between excessive force in arrest and other examples of excessive force. See *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (cited by both *Wise* and *Shillingford*).

the defendants satisfied the *Gumz* requirements. Thus, the undisputed evidence shows that under the circumstances painted by the plaintiffs, the conduct of the defendants did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

We do not have to decide whether the plaintiffs made a case under the objective reasonableness standard given the state of the law when the defendants acted. Even under *Lester*, however, as noted above, plaintiffs have not shown that the defendants' actions—which they themselves describe merely as some physical contact—was unreasonable under the circumstances. As noted above, Chathas never testified that she was willing to proceed voluntarily. Ellis testified that he would not proceed voluntarily. In *Lester*, this court emphasized that not every push and shove would form the basis for a Fourth Amendment claim. We need not set forth what possible combination of circumstances would make the force the defendants used unreasonable. We hold merely that plaintiffs did not prove or offer evidence to prove those circumstances here.

Because the only allegation against Cainkar was that he conspired with the other defendants to violate the plaintiffs' constitutional rights and because the other defendants cannot be found liable, Cainkar also cannot be liable. Although the district court held that Cainkar was entitled to absolute immunity, we need not decide this issue because Cainkar, like the other defendants, either did not violate anybody's constitutional rights or was qualifiedly immune.

Finally, while plaintiffs allege that all the defendants actively conspired to deprive them of their constitutional rights, plaintiffs and the evidence they presented at trial did not support these conclusory allegations. This failure to present supporting evidence of any conspiracy means that the qualified immunity to which the defendants are entitled cannot be defeated. See *Myers v. Morris*, 810

F.2d 1437, 1453 (8th Cir. 1987); *Hollowell v. Gravett*, 703 F.Supp. 761, 764 (E.D. Ark. 1988).

Because plaintiffs have not shown that defendants violated any of their *constitutional* rights or have not overcome the qualified immunity to which defendants are entitled, we must affirm the district court's decision.

AFFIRMED.

FAIRCHILD, *Senior Circuit Judge*, concurring in part, dissenting in part.

I can agree that the information Dr. Doshi gave the Evergreen Park Police was probable cause to believe that Ellis' mental condition made him dangerous to himself or others. For the content of probable cause in this context, *see McKinney v. George*, 556 F. Supp. 645, 650 (N.D. Ill. 1983), *aff'd* 726 F.2d 1183; *Baltz v. Shelley*, 661 F. Supp. 169, 178-79 (N.D. Ill 1987). *See also*, Annotation: *Right, Without Judicial Proceeding, to Arrest and Detain One Who Is, or Is Suspected of Being, Mentally Deranged*, 92 A.L.R.2d 570 (1963 & Supps. 1983 & 1989).

Because the officers had probable cause, arrest of Ellis in order to convey him to the mental hospital for examination and possible commitment would be reasonable under the Fourth Amendment, and failure to comply with state requirements would be immaterial. *McKinney v. George*, 726 F.2d 1183, 1187-88 (7th Cir. 1984). With all respect, however, my examination of the record leads me to conclude that Ellis sufficiently made out a *prima facie* case that he was subjected to excessive force by the defendants he identified.

I can agree that the court order requiring a search for weapons justified the deputies in searching Chathas. In my opinion, however, her testimony, if believed, that DiCarlo and another deputy, after failing to respond to her request for an explanation, lifted her up by the arms

and took her to the jury room, made out a *prima facie* case of unreasonable seizure of her person in violation of the Fourth Amendment.

On the point of qualified immunity, I do not agree that plaintiffs' Fourth Amendment rights had not been clearly established.

As to the other claims asserted by plaintiffs, I agree that the District Court correctly directed a verdict.

A true Copy:

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No. 89-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALICE CHATHAS and BYRON ELLIS,

Petitioners,

vs.

NORBERT SMITH, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS NORBERT SMITH, THOMAS EVOY, CARL BERGMAN AND KENNETH KLOMHAUS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Although the Petitioners' questions presented lump a variety of alleged constitutional issues into each question, these Respondents will accept the statement of questions presented by the Petitioners.

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No. 89-910

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OPINIONS BELOW

DISTRICT COURT: The District Court's opinion granting the Respondents' Motion for a Directed Verdict at the close of the Petitioners' case is unreported.

COURT OF APPEALS: The opinion of United States Court of Appeals for the Seventh Circuit affirming the District Court's judgment is reported at 884 F.2d 980.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). The Court of Appeals rendered its opinion on September 5, 1989. The Petition was timely filed in accordance with Supreme Court Rule 20 and 28 U.S.C. § 2102(c).

The Court of Appeals had jurisdiction to review the District Court's final Order pursuant to 28 U.S.C. § 1291.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The District Court denied the Petitioners' timely post-trial motion on October 15, 1987. The Petitioners filed a Notice of Appeal on November 9, 1987.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioners have set forth all relevant statutes and constitutional provisions in their Petition.

STATEMENT OF THE CASE

The Petitioners filed this action pursuant to Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. They originally alleged that the Respondents deprived them of rights protected by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution. At the

close of the Petitioners' case, the District Court granted Respondents Smith, Bergman, Evoy and Klomhaus' Motion for a Directed Verdict. After carefully considering the evidence, the District Court concluded that the Petitioners had failed to establish any violation of their constitutional rights and that there was no evidence to suggest that these Respondents did not have a good faith belief that their actions were constitutional. Once again, after carefully reviewing the Record, the Court of Appeals affirmed the District Court's judgment. The Petitioners have now filed this Petition seeking a Writ of Certiorari.

STATEMENT OF FACTS

Shortly after receiving notice that he had not been enrolled in the Illinois Municipal Retirement Fund (IMRF), Byron Ellis, through his attorney, Alice Chathas, filed suit against the IMRF; the Board of Trustees of the Village of Evergreen Park; Carl Bergman, an Evergreen Park police officer and secretary of the Evergreen Park Police Pension Fund; and Hamilton Maher, Clerk of the Village of Evergreen Park and local agent for the IMRF (R. 445-46, 76, 449).[1] On March 30, 1981, Alice Chathas and Byron

[1] In their questions presented, the Petitioners have asked this Court to review the District Court and the Court of Appeals' decisions that the Petitioners failed to present sufficient evidence to allow a reasonable juror to conclude that the Respondents had violated their constitutional rights. In order to determine whether the case is worthy of further review, the Court should have all the facts elicited during the Petitioners' case. The Petitioners'

(Footnote continued on following page)

Ellis arrived at the Worth Township Courthouse in Alsip, Illinois to attend a scheduled hearing on pending motions and possibly the beginning of a trial in the pension litigation (R. 458). This case arises out of an incident which occurred at the courthouse on March 30, 1981.

The Respondents can be divided into three groups.[2] On March 30, 1981, Vincent Cainkar was an attorney for the Village of Evergreen Park (C. 138 at par. 3). He was representing the Village in Mr. Ellis' pension litigation. Carmen Dicarlo, James Ross, Angie Chmielewski and Vincent Ruffalo were deputies of the Sheriff's Department of Cook County, Illinois (C. 138 at par. 2). On March 30, 1981, these Respondents, Norbert Smith, Carl Bergman, Thomas Evoy and Kenneth Klomhaus were police officers of various rank with the Evergreen Park Police Department (C. 138 at par. 1).

EVENTS PRIOR TO MARCH 30, 1981

Prior to March 30, 1981, Mr. Ellis made a claim for disability benefits. The IMRF referred him to Dr. Ramesh H. Doshi, a psychiatrist, for an examination to determine whether he was disabled (C. 138 at par. 7; R. 354-55). Dr. Doshi first examined Mr. Ellis on March 19, 1981 (C. 138

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[1] *continued*
Statement of Facts is not complete, therefore, these Respondents set forth those facts in detail. Although the record in this case has not been filed in this Court, these Respondents will specifically refer to the portions of the record which support the facts as set forth in their Statement of Facts. References to the Common Law Record will be cited as (C. ____). References to the trial transcript will be cited as (R. ____).

[2] All questions presented do not relate to all the Respondents, therefore, these Respondents will set forth only the facts relevant to the allegations against them.

at par. 7; R. 354-55). Dr. Doshi testified that during the course of the examination, Mr. Ellis told him that he was feeling depressed, he was having a great deal of difficulty with sleep and concentration and he was experiencing distress. In addition, Mr. Ellis felt that there was a conspiracy against him (R. 356). Dr. Doshi further testified that Mr. Ellis suggested that since his pension litigation began, several incidents had occurred which he believed threatened his life and his attorney's life (R. 357). It was obvious to Dr. Doshi that Mr. Ellis believed that the Evergreen Park Police Department was responsible for these incidents (R. 277-78).

During the course of the examination, Mr. Ellis discussed his pension litigation and according to Dr. Doshi stated that if he felt mistreated or cornered, he may "blow somebody away". Mr. Ellis admitted that he told Dr. Doshi that "if someone was to make and be a threat to my life that I would take the appropriate amount of action to terminate the situation, even if the action meant taking their life, to kill them." (R. 848). It was clear to Dr. Doshi that the potential victims were the administration and or police department of the Village of Evergreen Park (R. 364). Dr. Doshi concluded that Mr. Ellis' "insight and judgment are grossly impaired due to delusional state." (R. 260). Dr. Doshi's ultimate diagnosis was paranoid state with depression (R. 361).

Due to Dr. Doshi's concern about Mr. Ellis' threatening statement, he examined him a second time on Saturday, March 21, 1981 (R. 363). Following that examination, Dr. Doshi's diagnosis remained the same and Dr. Doshi recommended that Mr. Ellis agree to be voluntarily admitted to a hospital (R. 363-64). Dr. Doshi testified that, when Mr. Ellis refused a voluntary admission to the hospital, he advised him that he felt obligated to let the intended

victims know about his concern over the threats. In addition, Dr. Doshi called Attorney Chathas to request her assistance in convincing Mr. Ellis to enter a hospital voluntarily and to inform her that he felt obligated to notify Mr. Ellis' potential victims (R. 364).

On the afternoon of March 21, 1981, Dr. Doshi called the Evergreen Park Police Department because he felt a "serious potential for serious harm to one or more people anticipating the court date coming up for the pension decision" (R. 365-66). The call was directed to Sergeant Klomhaus (R. 366). After introducing himself, Dr. Doshi informed Sergeant Klomhaus of the statements made by Ellis and told him that although he did not think Ellis was an immediate threat, the potential for violence was there (R. 366-67). Approximately one hour later, Dr. Doshi received a call from Sergeant Klomhaus to confirm the earlier conversation. Approximately one week later, Sergeant Klomhaus contacted Dr. Doshi and told him that the legal department of the Village had asked him to sign a certificate for involuntary hospitalization (R. 368, 380).

On March 28, 1981, Dr. Doshi completed that certificate, including the following impression: "If patient feels under stress or if he loses control, situation could prove dangerous to others and even himself." (R. 383). Dr. Doshi considered the court appearance to be a particularly stressful situation and if some judgment or ruling was made against him the time bomb could go off (R. 418). Dr. Doshi believed there was a serious potential for violence (R. 386).

There were at least two incidents prior to March 21, 1981 which raised concern in the minds of Evergreen Park police officers about Mr. Ellis' psychological stability. An Interdepartmental Investigating Officer Memorandum, dated December 11, 1978, referred to a station complaint

that Mr. Ellis had a gun in his house (R. 127). According to the Memorandum, Officers Randolph, Swanstrom and Sergeant Klomhaus responded to a call from Mrs. Ellis that a man had a gun (R. 127-128). The Memorandum prepared by Sergeant Klomhaus and addressed to Assistant Chief Bergman stated: "Mrs. Ellis stated she found him in a highly nervous state," and that "he had been sitting on the couch in the living room with his silver gun by his side. She further stated that when she called, he went to the basement. Mrs. Ellis stated she feared that Detective Ellis might take his own life." (R. 129-30). The Memorandum continued, "spoke to Detective Ellis from the head of the stairs and received the reply that if we or anyone came down and set a foot on the stairs he would blow us away." (R. 130).

Lieutenant Bergman informed Chief Norbert Smith about the prior incident with Mr. Ellis. Chief Smith testified that he instructed Lieutenant Bergman not to allow Mr. Ellis to return to work until he was examined by a Village doctor and a psychiatrist (R. 180). On January 8, 1979, Dr. McLaughlin, wrote a letter indicating that Byron Ellis had been under his care and "since stabilization of domestic problems he has exhibited no symptom or findings and he may return to work" (R. 135, 181). After this incident Mr. Ellis did return to his position as a detective with the Evergreen Park Police Department (R. 135).

A second incident occurred while Mr. Ellis was on duty on March 12, 1980. A Memorandum prepared by Sergeant Grimes stated: "at approximately 2106 hours reporting sergeant heard Officer Ellis request the supervisor and an additional officer to meet him at Christ Hospital. . . . Reporting sergeant was advised that Ellis would be admitted to the hospital for tests." (R. 144-45). In accordance with Department policy, Chief Smith made inquiries about

the nature of Mr. Ellis' illness (R. 146, 189). Ms. Chathas responded with an April 22, 1980 letter stating "Mr. Ellis entered the emergency room at Christ Hospital, he being under significant physical and emotional strain and apprehension due to his pending pension litigation and certain incidents which were of constant occurrence at the police department." (R. 146). Chief Smith learned that Ellis was under the care of Dr. B. J. Sokhey, a psychiatrist (R. 188-89). Based upon Dr. Sokhey's advice, Mr. Ellis did not return to his position with the Evergreen Park Police Department (R. 814).

In addition to these two incidents, prior to receiving the telephone call from Dr. Doshi on March 21, 1981, Chief Smith was aware that Mr. Ellis kept approximately 14 guns in his home, that he made his own bullets and that he kept containers of gun powder in his home (R. 176-77, 232-33). Mr. Ellis holds a sharpshooter classification with the National Rifle Association (R. 805). Between March 14 and March 18, 1981, Chief Smith had received a claim for workmen's compensation on behalf of Mr. Ellis. The claim form indicated that the nature of the injury claimed was anxiety, neurosis and depression (R. 201-02). Chief Smith was aware of these factors when on March 23, 1981, he received a Memorandum from Sergeant Klomhaus describing the warnings from Dr. Doshi (R. 196-198). That Memorandum stated:

> "At approximately 1605 hours on line 422-5231 reporting sergeant received a call from Dr. Doshi, who advised that the call was in regard to an employee whom the doctor feels is potentially dangerous. The doctor advised that the officer is Byron Ellis."
>
> "Reporting sergeant requested the doctor call on line 422-2141 so that the call could be taken in private, which the doctor immediately did."

"A brief synopsis of the doctor's comments are as follows: The doctor is advising the police because of the potential for homicide that he feels Byron Ellis exhibits, Officer Ellis commented words to the effect that if those who are conspiring against him don't back off he's going to blow them away."

"Byron was sent to Dr. Doshi by the IMRF for evaluation on a disability. Byron went with his attorney. The evaluation took place on Thursday, March 19, 1981 at the doctor's office at 7600 College Drive, Palos."

"The doctor feels that Byron is in need of immediate hospitalization, and with the attorney attempted to talk Byron into going into the hospital. Byron refused."

"The doctor described Byron as a time bomb who, although appears to be stable now, can go off at any time. The doctor feels Byron should not be in possession of any weapon."

"The doctor further feels that the next court date on his suit against IMRF and the Village, which is believed to be 3/30 of '81, could be a critical point, especially if the decision is against Byron."

"The doctor stated he advised both the attorney and Byron that he would be notifying the police department about Byron's comments. Byron said 'go ahead'."

"Reporting sergeant verified that Dr. Doshi is on the staff of Little Company of Mary Hospital and also has an office at 7600 College Drive in Palos."

"Reporting sergeant called the doctor back at his home on line 422-2144 to verify if he indeed was the caller. It was verified."

"The doctor further related that in order to commit someone such as Byron a petition must be signed, and anyone can sign it. This, with two doctors' statements that a person is in need of psychiatric help, will allow a judge to sign commitment papers."

> "The doctor advised that the reason for the call is because he feels that there is great potential for something bad to happen and he feels bound by law to report it. Reporting sergeant advised Chief Smith of the conversation by telephone to Chief Smith's home. Doctor can be reached at his office. TX No. . . . , or at home, . . . , if further explanation or comment is needed."

(R. 196-98). After reading the Memorandum, Chief Smith reviewed the tape recordings of Sergeant Klomhaus' conversations with Dr. Doshi and then contacted the village attorney, Vincent Cainkar, to apprise him of the situation (R. 203-04, 225). Neither Chief Smith nor Lieutenant Bergman had encountered a situation such as this, therefore, they also sought guidance from Mr. Cainkar on how to handle the situation (R. 204, 243).[3] Lieutenant Bergman testified that they did not want a confrontation with Ellis at his home where he had access to weapons, bullets and gun powder (R. 244).

On Friday, March 27, 1981, Mr. Cainkar called Chief Smith to inform him that he had discussed the situation with Judge Eiserman, the judge presiding over the courthouse where the hearing in the pension case was scheduled. The judge ordered additional security for the courtroom and ordered all persons entering the courthouse that day to be searched (R. 205). Mr. Cainkar asked Chief Smith to have one of his officers pick up a certificate from his home, take it to Dr. Doshi to be completed and then return it to his home (R. 205-06). Sergeant Klomhaus obtained the certificate and after it was completed by Dr.

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[3] Mr. Ellis, also a police officer, testified that the first time he had heard of the statute providing for an involuntary psychiatric evaluation was March 30, 1981 (R. 899).

Doshi on Saturday, March 28, 1981, Lieutenant Evoy returned it to Mr. Cainkar (R. 206).

MARCH 30, 1981

On March 30, 1981, Officer Bergman, Lieutenant Evoy and Chief Smith arrived at the courthouse before Ms. Chathas and Mr. Ellis (R. 151-52). At the request of the sheriff's deputies they removed the bullets from their guns (R. 228-29, 243, 285). These Evergreen Park Officers met with Deputies Ross and Ruffalo and Mr. Cainkar (R. 153). Both Deputy Ross and Mr. Cainkar informed the officers that the judge did not want Mr. Ellis or the matter in the courtroom (R. 154). During a discussion which included Officers Smith, Evoy and Bergman, Deputies Ross and Ruffalo and Mr. Cainkar, a decision was made to stop Mr. Ellis after he entered the building and take him into custody for a psychiatric evaluation (R. 154-55).

Ms. Chathas and Mr. Ellis entered the building and passed through an initial search station set-up by the Cook County Sheriff's Deputies (R. 157). After Mr. Ellis passed through the initial search station, he proceeded toward the courtroom (R. 158-59). Chief Smith, Lieutenant Evoy and Lieutenant Bergman approached Ellis and informed him that they had a certificate signed by Dr. Doshi and asked Ellis to accompany them to the Tinley Park Mental Health Center for a psychiatric evaluation (R. 159; C. 138 at par. 19; R. 295-97, 317).

Prior to confronting Mr. Ellis, the Evergreen Park police officers did not speak to Ms. Chathas (R. 161). When Mr. Ellis called for Ms. Chathas, she emerged from the jury room (R. 164). Mr. Ellis, Chief Smith and Lieutenants Evoy and Bergman all entered the jury room (R.

165, C. 138 at par. 19). Deputy Ruffalo testified that he did not observe any of the Evergreen Park police officers beating, punching or kicking Mr. Ellis (R. 692-93). In addition, the Petitioners and some sheriff's deputies were also present in the jury room (R. 165-66, C. 303).

Mr. Ellis remained in the jury room for 30 to 90 minutes. During that time, Respondent Ruffalo also remained in the jury room. Ms. Chathas and Respondents Cainkar, Smith, Evoy, Bergman and Ross entered and left the room at various times (C. 138 at par. 20). During this time, Ms. Chathas was able to leave the jury room (R. 472, 543, 617). In fact, she left to obtain a copy of the Illinois Revised Statutes to check on the authority for seeking an involuntary psychiatric evaluation of Ellis (R. 474). Ms. Chathas testified that none of the Evergreen Park police officers touched, pushed or put their hands on her at any time or in any way (R. 544-45). When asked how Chief Smith hindered her, Chathas responded "not a physical hindrance like blocking me or preventing me that way, but hindering me in that I needed to speak with my client and he would not cooperate in permitting me some privacy to maintain the integrity of the attorney-client relationship" (R. 630-31).

Eventually, paramedics from the Alsip Fire Department transported Mr. Ellis, Ms. Chathas and an Alsip police officer to the Tinley Park Mental Health Center (C. 138 at par. 24). Upon arrival at Tinley Park, they were met by Donald Warmack, a Mental Health Specialist II working in central admissions (R. 737-38). Shortly after Mr. Ellis arrived, Lieutenant Evoy and Sergeant Klomhaus also arrived at Tinley Park (C. 138 at par. 25; R. 747). The officers presented Mr. Warmack with the certificate signed by Dr. Doshi. In Mr. Warmack's opinion, the certificate was not valid because it had not been signed by

a physician who had examined the patient within the prior 72 hours (R. 748). According to Mr. Warmack, the information contained in the certificate would have been sufficient if Dr. Doshi had come to Tinley Park and signed a petition based upon his personal observations (R. 777-78).

After deciding that the certificate was not valid, Mr. Warmack asked everyone present whether they had any personal observations which could be used as the basis for a petition for a 24-hour evaluation (R. 751-53). Sergeant Klomhaus relayed the 1978 incident in the basement of Ellis' home but Mr. Warmack rejected that observation as too distant to support a petition (R. 289, 752). After approximately 30 to 45 minutes at Tinley Park, Ellis was permitted to leave (R. 755, 904). Although he claimed to be sore, Ellis did not go to see a doctor about any physical injuries he may have suffered on March 30, 1981 (R. 857). Nor has he seen any psychiatrist subsequent to March 30, 1981 (R. 814).

Petitioners' Complaint

On July 13, 1981, Alice Chathas and Byron Ellis filed suit seeking to recover damages pursuant to 42 U.S.C. § 1983 for injuries resulting from the deprivation of constitutional rights (C. 1). Specifically, the Petitioners claimed that the Respondents' actions deprived them of rights protected by the Fourth, Sixth and Fourteenth Amendments (C. 1). On May 14, 1986, the Petitioners filed an Amended Complaint again citing 42 U.S.C. § 1983 and violations of the Fourth, Sixth and Fourteenth Amendments as the basis for their causes of action (C. 183). Respondents Smith, Bergman, Evoy and Klomhaus filed a motion for summary judgment (C. 207-213, 216). The District Court took that motion under advisement. At the close of the

Petitioners' case, these Respondents made a motion for a directed verdict essentially incorporating the arguments made in their motion for summary judgment (C. 380).

District Court

In granting these Respondents' Motion for a Directed Verdict, the District Court held that the Evergreen Park police officers had probable cause to detain Mr. Ellis for the purpose of attempting to have him admitted for a 24-hour psychological evaluation (R. 973-75). Furthermore, the Petitioners had failed to present any evidence establishing that the Evergreen Park police officers were not acting with a good faith belief that they had probable cause to detain Mr. Ellis (R. 975). Finally, the District Court concluded that there was no evidence presented that Ms. Chathas was in any way restrained or detained by Evergreen Park police officers (R. 972). After the District Court denied their motion for a new trial, the Petitioners appealed the judgment.

Court of Appeals

After reviewing the Record, the Court of Appeals affirmed the District Court's decision. *Chathas v. Smith*, 884 F.2d 980 (7th Cir. 1989). The Court of Appeals unanimously held that the evidence presented at trial could lead only to the conclusion that the Respondents had probable cause to transport Mr. Ellis to the mental health center or at least had a good faith belief that they had probable cause. 884 F.2d at 987, 989. The Court concluded that because the Respondents had probable cause, they did not violate Mr. Ellis' right to be free from unreasonable searches or seizures. *Id.*

The unanimous Court also concluded that even if the Constitution protects a litigant's right of access to state courts, in this case, the Petitioners presented no evidence that the continuance of the pension litigation, which was ordered by the judge prior to the time Ms. Chathas and Mr. Ellis arrived at the courthouse, resulted in any prejudice or injury to the Petitioners. 884 F.2d at 987-88, 990.

The majority of the Court held that there was no evidence of any severe injury to the Petitioners or malice by the Respondents. 884 F.2d at 988. Moreover, the majority concluded that based upon the evidence presented by the Petitioners, a jury could not reasonably find that the use of force was unreasonable under the circumstances. 884 F.2d at 988. In addition, the majority concluded that, at the time of this incident, the standard by which the Respondents' conduct is measured in order to determine when that conduct constitutes the use of excessive force was not settled. *Id.* Therefore, the majority also concluded that the Respondents would be entitled to qualified immunity. Significantly, the Court also concluded that the Petitioners had presented no evidence to support their conclusory allegations of conspiracy. 884 F.2d at 989.

The dissenting appellate judge disagreed with the majority's opinion in only three respects. First, the dissenting judge believed that the evidence was sufficient for a juror to conclude that Ms. Chathas was subject to an unreasonable search and seizure. 884 F.2d at 990. Second, the dissenting judge believed that Mr. Ellis had presented a *prima facie* case that he was subjected to use of excessive force. *Id.* Third, the dissenting judge believed that Petitioners' Fourth Amendment rights had been clearly established, at the time of the incident, thereby prohibiting the use of the qualified immunity defense. *Id.*

REASONS FOR DENYING THE WRIT

This Court has set forth in Supreme Court Rule 17 guidelines for determining when certiorari should be granted to review the decision in a particular case. When the guidelines in Rule 17 are applied to the Court of Appeals' holdings in this case, it is clear that the questions presented by the Petitioners do not warrant review by this Court. The questions presented either do not relate to the conduct of these Respondents or ask this Court to disagree with the District Court and the majority of the Appellate Court which concluded that the Petitioners failed to present sufficient facts to make a *prima facie* case for a violation of their constitutional rights. The Petitioners do not raise questions which ask the Court to resolve any conflict among the circuits or to consider an important question of federal law which this Court has not previously considered.

THE QUESTIONS PRESENTED DO NOT ASK THE COURT TO RESOLVE A CONFLICT AMONG THE CIRCUITS OR TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN PREVIOUSLY ADDRESSED BY THIS COURT.

The first question presented is whether the conduct by the Cook County Sheriff's Deputies in directing Ms. Chathas to an empty jury room to conduct a more through search in private violated her Fourth Amendment right to be free from unreasonable search and seizure and whether the force used in conducting the search was excessive. Initially, it is important to note that the Court of Appeals concluded that there was no evidence presented to support the allegations of conspiracy. 884 F.2d

at 989. The allegations of conspiracy had not even been raised in the District Court. In the absence of evidence to support the allegations of conspiracy, the conduct of each individual Respondent must be considered separately. No Respondent or group of Respondents can be responsible for the conduct of other Respondents.

These Respondents were not involved in directing Ms. Chathas to the jury room or conducting the search. In fact, Ms. Chathas testified that none of the Evergreen Park police officers touched her (R. 544-45). She also testified that during the 30-90 minutes Mr. Ellis was detained in the jury room, she entered and left the room at various times (C. 138 at par. 18). She admitted that she did not even see Sergeant Klomhaus at the courthouse (R. 544). He certainly could not have conducted an unreasonable search or seizure or used excessive force. Although Ms. Chathas did testify that Chief Smith hindered her by not giving her privacy to talk to her client, this alleged hinderance is not a search or seizure within the meaning of the Fourth Amendment.

Even assuming that somehow the conduct of these Respondents' can be considered a search or a seizure, there is no evidence that it was not reasonable under the circumstances. The Fourth Amendment prohibits only unreasonable searches and seizures. The constitutionality of a search or seizure depends upon the reasonableness of the government's interest balanced against the degree to which the individual's liberty is infringed. *United States v. Place*, 462 U.S. 696, 703 (1983). The government's interest in this case justified any minimal infringement on Ms. Chathas' liberty.

Based upon the evidence presented it is also impossible for a reasonable juror to conclude that these Respon-

dents used excessive force against Ms. Chathas. An excessive force claim must be evaluated under the objective reasonableness standard of the Fourth Amendment. *Graham v. Connor*, ____ U.S. ____, 109 S. Ct. 1865 (1989). The Court of Appeals unanimously concluded that based upon the totality of the circumstances, the Petitioners had not presented evidence to establish that any force used against Ms. Chathas was unreasonable. 884 F.2d at 988, 990. This Court need not be the third Court to reach this conclusion.[4]

The second question presented by the Petitioners is whether Mr. Ellis was deprived of any constitutional right. The Petitioners appear to rely on three different constitutional rights. First, the Petitioners claim that Mr. Ellis was denied his constitutional right of access to the state courts. Although the Seventh Circuit questioned the continued viability of such a right, the Court did not hold that there was no constitutionally protected right of access to the state courts. Rather, the Court held that in this case, the Petitioners had failed to present any evidence that they were denied access. In fact, at worst their access was only delayed. The Petitioners failed to present any evidence that they were prejudiced by the delay.

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[4] The Petitioners argue that the Court of Appeals erred when it applied the qualified immunity defense to the Petitioners' excessive force claims. Although the Court of Appeals correctly applied the qualified immunity defense, this Court need not consider that issue. The Court of Appeals' conclusion that the standard for analyzing a constitutional claim of excessive use of force was not settled and, therefore, that the Respondents were entitled to qualified immunity was an unnecessary, superfluous analysis. The Court had already concluded that under either the Fourth Amendment objective reasonableness test or the Fourteenth Amendment analysis requiring sever injuries, disproportionate use of force and malice, the Petitioners had failed to meet their burden. 884 F.2d at 988.

If this Court were to recognize a constitutional right to a speedy trial in civil actions in state court, the volume of Section 1983 cases would dramatically increase. While delay may at some point equal denial, the Seventh Circuit was correct that in this case it did not.

The Petitioners apparently are also asking this Court to review the Court of Appeals conclusion that these Respondents did not use excessive force on Mr. Ellis. The degree of force which is appropriate in any particular case depends upon the circumstances of that case. *Graham*, 109 S.Ct. at 4865. The majority of the Court of Appeals believed that the Petitioners had not presented sufficient evidence to establish that the degree of force used by these Respondents was not reasonable under the circumstances. The Petitioners have not demonstrated that this conclusion is inconsistent with factual conclusions of this Court or other Circuits in similar cases. Moreover, the Petitioners have not established that this issue presents an important question of federal law which should be resolved by this Court.[5]

The Petitioners also argue that these Respondents violated Mr. Ellis' Fourth Amendment right to be free from unreasonable searches and seizures because they did not have probable cause to detain him long enough to attempt to have him involuntarily admitted for a 24 hour psychiatric evaluation. Probable cause arises at the moment that the facts and circumstances within the officer's knowledge warrant a prudent man to believe that the suspect had committed or was committing a crime. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The District Court and the unanimous Court of Appeals carefully reviewed all the evidence and

[5] See Note 4 *supra*.

concluded that based upon the circumstances and facts available to the officers in this case, these Respondents did have the probable cause necessary to detain Mr. Ellis.

These Respondents had received the warnings from Dr. Doshi. They had personal knowledge of at least two prior incidents which questioned Mr. Ellis' stability. They had sought advise of counsel. The presiding judge of the courthouse had advised them that he did not want the individual or the matter in his court room. The actual intrusion on Mr. Ellis' liberty was minimal. The 2-2½ hour detention was justified by all of the information available to these Respondents. Again, the Petitioners ask this Court to be the third Court to review the particular facts in this case. The Petitioners second question does not meet the standards set forth in Supreme Court Rule 17.

The third question presented is whether Respondent, Vincent Cainkar was entitled to absolute immunity. The Writ of Certiorari should not be granted to consider this question. First, this question is not directed at these Respondents. Moreover, the Seventh Circuit expressly refused to consider this issue. The Court stated: "Although the district court held that Cainkar was entitled to absolute immunity, we need not decide this issue because Cainkar, like the other defendants, either did not violate anybody's constitutional rights or was qualifiedly immune." 884 F.2d at 989. Accordingly, the Seventh Circuit's holding is not inconsistent with a holding of this Court or another circuit and the Petitioners' third question presented is not an important question of federal law which should be resolved by this Court. The Petitioners have offered no other reasons for this Court to grant the writ of certiorari.

CONCLUSION

Supreme Court Rule 17 provides guidelines for consideration of petitions for writ of certiorari. The Petitioners have failed to establish that any of the questions presented fall within the guidelines set forth in that Rule. When the questions presented are stripped to their essence, the Petitioners do not present important questions of federal law or quest ons on which there is disagreement among the Circuits. Instead, the Petitioners ask this Court to be the third Court to consider whether these Respondents had probable cause to detain Mr. Ellis and whether these Respondents used reasonable force against Mr. Ellis under the circumstances. These Respondents respectfully submit that these questions are not the type worthy of consideration by this Court. Accordingly. these Respondents request that the Petition be denied.

Respectfully submitted,

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No. 89-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALICE CHATHAS and BYRON ELLIS,

Petitioners,

v.

NORBERT SMITH, Individually and as Chief of Police of Village of Evergreen Park, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JAMES ROSS, VINCENT RUFFALO, CARMEN DiCARLO AND ANGIE CHMIELEWSKI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the directed verdict was properly affirmed, consistent with applicable precedent, where the Deputies' conduct was objectively reasonable in effectuating the judicial order for security, and no reasonable jury could have found for plaintiffs.

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STATEMENT OF THE CASE

Petitioners are Byron Ellis and Alice Chathas, Mr. and Mrs. Ellis at the time of trial. The Respondent Cook County Sheriff's Deputies[1] are James Ross, Vincent Ruf-

[1] Among defendants in this case, plaintiffs initially named as defendants ten Cook County Sheriff's deputies who had been present in the Worth Township Courthouse on March 30, 1981. (R. 1, Complaint)

falo, Carmen DiCarlo and Angie Chmielewski. Deputies DiCarlo and Chmielewski were granted summary judgment against Ellis prior to the trial (a fact which both the district court and court of appeals overlooked (R. 155, Mem. Op.). The other Respondent Deputies, as well as the other defendants in the case, were all granted directed verdicts, which were affirmed by the Court of Appeals decision.

Security was set up at the Worth Township Courthouse on March 30, 1981, pursuant to the order of Presiding Judge Irving Eiserman, based upon a psychiatrist's report that Byron Ellis was potentially dangerous. (A. 6) That morning, Deputy James Ross spoke with Assistant Supervisor Vincent Ruffalo, and explained the reason for the security, a potential problem with Byron Ellis, who was a "walking time bomb." The concern was a potential for violence. Therefore, everyone was to be searched, and no weapons would be permitted. (Tr. 257-258, 261, 309, 314, 645-646, 667-668) Mr. Ross disclosed the reason for the extra security to Mr. Ruffalo only, because he did not want any attention focused on Byron Ellis. (Tr. 315, 669)

Ross, who was familiar with the building, told Ruffalo to see that all doors except one were locked, and to set up a security checkpoint. (Tr. 257-258, 314-315) Ruffalo did so, and posted deputies at various assignments. (Tr. 670) Any guns, including those of police officers, were checked in and locked in a file cabinet. (Tr. 263-264, 318)

Neither Ross nor Ruffalo participated in any discussion regarding taking Ellis to Tinley Park. (Tr. 209-210) Mr. Ross asked the Evergreen Park officers to stand out of the way, so that Byron Ellis could not see them when he came in, because after reading the letter Judge Eiserman had shown him, Ross was concerned that seeing them might upset Ellis. (Tr. 286)

Deputy Carmen DiCarlo was assigned to operate the hand held metal scanning device at the checkpoint. A sign at the desk advised that persons entering would have to be searched. (Tr. 334-335) A pretrial stipulation specifies that Deputy DiCarlo stayed at the checkpoint at all times while plaintiffs were in the building. (R. 138, Pretrial Order, stip. 16; Tr. 612-614)

Deputy Angie Chmielewski was assigned to search women's purses. (Tr. 681) Such carried items must be checked visually, because common items such as keys frequently set off a scanning device. (Tr. 343) Mrs. Chmielewski was to check purses of all women who entered the building, and when circumstances permitted, she did so in the privacy of a jury room. (Tr. 289-290, 343-344, 680-681) Neither Deputy DiCarlo nor Deputy Chmielewski was informed of anything particular regarding Byron Ellis or Alice Chathas. (Tr. 681)

The purpose of the deputies that day was to provide for the security of the courthouse and of all persons present. (Tr. 682) They were to make sure that no firearms were available in the building (Tr. 677-678; A. 6), and to preserve peace and order. (Tr. 306-307, 698)

Plaintiffs Chathas and Ellis arrived at the courthouse at about 11:40 a.m., and approached the security checkpoint. (Tr. 460-461) DiCarlo was not wearing a gun. (Tr. 609) He scanned Chathas with the metal detecting device and she was allowed to pass into the rotunda area (Tr. 157-158, 161), where she walked and was met by Angie Chmielewski. They walked together, not touching, into the jury room, where Angie was to search Chathas' purse. (Tr. 161, 210-211, 289-290, 294, 317, 679-680)

Chathas herself testified that after she had been scanned, she took a step. Then, according to Chathas, Deputy DiCarlo

and an unidentified deputy took her by her arms, lifting her body, and moved her against her will to the jury room, where Angie Chmielewski was waiting. (Tr. 463) Chathas testified that the door to the jury room was closed after her and that the lights were out. (Tr. 463-464) Other witnesses said that the door was partially closed, and partially open, and that the fluorescent lights were on, but were not very bright. (Tr. 295, 330, 680)

Chathas testified that Mrs. Chmielewski searched her purse and did a pat-down. (A. 7) According to Chathas, Angie did not respond to inquiries as to why the search was required. She smiled at Chathas and laughed a little. (Tr. 464-465) Angie was not carrying a gun, and Chathas did not remember ever seeing her with a gun. (Tr. 615) Chathas, who testified that she was sure that she was singled out for a search (Tr. 610), admitted that she did not know what went on outside her presence. (Tr. 609)

Chathas testified that she knew Angie Chmielewski and Carmen DiCarlo previously, and that she had had no problems or quarrels with either of them. (Tr. 605-606, 625-627) In her testimony, she referred to them as "Angie" (Tr. 464-465, 626), and "Carmy." (Tr. 626) On April 1, 1981, 2 days after being at the Worth Township Courthouse, Chathas gave a signed statement, at her own office, to David Copeland, the Director of the Sheriff's Internal Investigations Division. (Tr. 622-624) That statement mentioned Ross and Ruffalo by name, indicating that they walked into a room. The statement does not refer to Carmen DiCarlo or to Angie Chmielewski. Chathas knew both by name and knew that they worked for the Sheriff. (Tr. 625-627)

While Chathas went to the jury room, DiCarlo scanned Ellis, opening and checking his briefcase. Then Ellis was

permitted to pass the checkpoint, and he proceeded into the rotunda area, toward the courtroom. (Tr. 158, 648, 814, 855, 894, 915-916)

Consistent with plaintiffs' pretrial stipulation (R. 138, Pretrial Order, par. 16; Tr. 612-614), Ellis testified that Deputy DiCarlo, after scanning Chathas, remained at the security checkpoint and scanned Ellis next. (Tr. 892-893, 914-916) Ellis characterized DiCarlo's conduct as "a gentleman at all times." (Tr. 916) Ellis testified that he had seen Chathas taken away by unidentified deputies and made no effort to stop them then, or to follow her once he was past the checkpoint himself. (Tr. 584-585, 892-894)

Chief Smith, Lt. Evoy and Lt. Bergman approached Ellis and requested that he go to Tinley Park for a psychiatric evaluation. (Tr. 159, 295-297, 302, 648, 815) Ellis refused and called out for Chathas, who came out of the jury room. (Tr. 161-162, 302, 467) Chathas testified that she saw no deputy touch Ellis. (Tr. 615)

Ellis himself testified that he was struggling with Smith, Evoy, Bergman and others, trying to get into the courtroom, and that Ross tackled him by the waist and pulled him away from the courtroom. (Tr. 816; A. 7) Ellis knew that the job of deputy sheriffs is to keep order in the courtroom, and admitted that Ross did not want Ellis, kicking and struggling, in the courtroom. (Tr. 917-920) In his signed statement to David Copeland on April 1, 1981, Ellis did not mention being tackled or otherwise touched by Ross. (Tr. 922-926) Jim Ross testified that he did not touch Ellis, and never saw any other deputy touch Ellis. (Tr. 330)

Ellis was speaking loudly. (Tr. 320) The group was near the jury room. Chathas went back in, and the others followed. (Tr. 302, 318, 467) After they had been in the room

a short while, and the argument was rather heated, Ruffalo suggested that the three plainclothes Evergreen Park officers leave, so Ellis could talk to his counsel alone. (Tr. 675) Ruffalo himself stayed in the room with Ellis to prevent any violence. (Tr. 676)

Chathas walked in and out of the room several times. (Tr. 330, 542, 617) She testified that once Ross and Evoy were in her way and did not move when she asked them to, but that she in fact did exit and no one grabbed or stopped her. (Tr. 472; A. 8) None of the defendants ever told her she had to stay in the room. (Tr. 618, 621)

Vincent Ruffalo testified that Ellis spoke of problems with the city, and threatened that before he would go to Tinley Park there would be a "blood bath". (Tr. 671-672, 677-678) Ellis said that the room was "full of weapons," meanwhile moving several ashtrays and placing two or three chairs in front of himself. (Tr. 687-688) Ruffalo testified: "[i]t was unmistakable, in my opinion, what he meant by the movement of those chairs" (Tr. 688), and "[m]y understanding of his movements and his actions was that he might become violent and use those objects in a violent fashion, unmistakable." (Tr. 691) Ruffalo did not have a gun with him in the room, having passed it to another deputy outside before he entered, and was at that time afraid of Ellis. (Tr. 694)

Terry Milan, an Alsip paramedic, testified that deputies took care of clearing bystanders away from the door to the jury room. (Tr. 703) Ross ordered the paramedics, before they entered the jury room, to remove from their belts their scissors and other implements, which could be used as weapons. (Tr. 325) When Milan entered the jury room to attend to Ellis, he saw no guns inside the room. (Tr. 710, 714) Initially, Chathas threatened that the para-

medics would be co-defendants in a lawsuit if they touched Ellis, but later gave permission for them to do their job. (Tr. 707-708)

After speaking to Alsip Police Sergeant Murray, a friend, Ellis agreed to go to Tinley Park peaceably. (Tr. 857-859) Ellis asked Ross to make sure the Evergreen Park officers were not present in the lobby, or Ellis would "blow up." (Tr. 326) Ross therefore made sure that the officers stayed in the courtroom. (Tr. 327)

Ellis and Chathas walked out of the jury room and out of the building. (Tr. 327, 484, 858-859; A. 9) They rode in an ambulance to Tinley Park. (Tr. 621) No deputy was present in the ambulance or at Tinley Park. (Tr. 621) At the time Chathas and Ellis left, people were still being scanned, and Jim Ross saw Angie checking a woman. (Tr. 328)

Neither Chief Smith nor James Ross ever saw Angie Chmielewski or any other deputy touch Chathas that day. (Tr. 211, 317) Ross neither touched Ellis nor saw any other deputy touch him that day. (Tr. 33)

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH OTHER COURT OF APPEALS' DECISIONS AND WITH THOSE OF THIS COURT, WHERE THE DEPUTIES CONDUCTED THEMSELVES REASONABLY TO EFFECTUATE THE JUDICIAL ORDER FOR SECURITY, AND WHERE NO REASONABLE JURY COULD HAVE FOUND FOR PLAINTIFFS.

Petitioners claim that their rights were violated, but make no effort to demonstrate any basis for granting certiorari. The Petition glosses over the attendant circum-

stances, which are therefore related in some detail in Respondents' Statement of the Case, *supra*. In fact, the court of appeals' opinion is consistent with the decisions of other courts of appeals and of this Court, and Petitioners have not demonstrated otherwise. Petitioners' claims against the deputies dissolve when analyzed in the context of the circumstances that day in the courthouse, as presented by the evidence in Petitioners' own case-in-chief.

First, it must be noted that the deputies provided security at the courthouse, but had nothing to do with taking Byron Ellis for a psychiatric evaluation. The Court of Appeals recognized this distinction (A. 14), although the Petitioners throughout this litigation have attempted to lump together all of the myriad defendants. Second, the Court of Appeals correctly found that the security was imposed by judicial order and that the deputies' conduct in enforcing that security was reasonable. (A. 6, 19)

Even crediting Chathas' testimony, which is contradicted by Ellis and by Petitioners' own pretrial stipulation, deputies assured that she went to the jury room, as required by the security procedure in place that day. She not only did not testify that she was willing to go, but in fact testified that she intended to go to the courtroom, and took a step toward the courtroom. Moreover, as the court of appeals noted, she offered no evidence of any injury. (A. 17-18) If her claim is one of unreasonable seizure, it cannot be disputed that she had no right to proceed until she had completed the judicially ordered security procedures in place that day, and requiring her to so proceed was not unreasonable.

Ms. Chmielewski merely examined Chathas' purse, and patted her down, manifestly reasonable conduct under the circumstances. (A. 11) Chathas has no claim whatsoever

against Ross or Ruffalo, especially as she admitted that she repeatedly entered and left the jury room. (A. 11)

Moreover, even if Ellis' testimony that Ross pulled him away from the courtroom is credited, Ellis himself said that he was struggling (Tr. 816) and that he was not willing to proceed voluntarily. (A. 19) He too claims no injury. (A. 18) Furthermore, Ellis did not even claim any force or alleged misconduct by Ruffalo. (A. 12)

Finally, there was no evidence whatsoever of any conspiracy (A. 19), and none, in particular, to keep Petitioners from access to court for their litigation. (A. 16) Petitioners utterly failed to prove any constitutional violations, and the directed verdict was properly affirmed.

It is apparent from this discussion and from the evidence at trial that the deputies' conduct was reasonable. Moreover, the court of appeals correctly stated that the law on excessive force was unsettled in 1981. (A. 18) In fact, it was not really settled until 1989, with this Court's opinion in *Graham v. O'Connor*, ____ U.S. ____, 109 S.Ct. 1865, 1872-1873 (1989), clarifying the Fourth Amendment standard of objective reasonableness, previously adopted by the Seventh Circuit in *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987). In 1981, the standard in the Seventh Circuit was no more lenient then that described in *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985), which required severe injuries, grossly disproportionate conduct, and malice or shocking of the conscience. Manifestly, as the court of appeals found in this case, there was no excessive force. (A. 16-18)

Petitioners failed to prove that the deputies' conduct was unreasonable under the circumstances. Consequently, the directed verdict was proper, either because there was no violation, or because of qualified immunity. Fur-

thermore, Petitioners fail to cite cases which are inconsistent with the court of appeals decision.

Camara v. Municipal Court, 387 U.S. 583 (1967), involved warrantless administrative searches, and like the rest of Petitioners' analysis, has no application to courthouse security, set up pursuant to judicial order, based on reasonable grounds. Examination of Petitioners' citation of only general authorities, and their argument which ignores the essential context of the events of March 30, 1981, establishes that Petitioners have failed to assert proper grounds for the writ they request, which should therefore be denied.

CONCLUSION

For the foregoing reasons, the Respondent Deputies pray that the writ of certiorari be denied.

Respectfully submitted,

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No. 89-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALICE CHATHAS and BYRON ELLIS,

Petitioners,

v.

NORBERT SMITH, Individually and as Chief of Police of Village of Evergreen Park, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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MOTION OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 36.3 of the Rules of this Court, the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Lawyers' Committee") moves for leave to file a brief *amicus curiae* in support of the Petitioners in the above-captioned proceeding. In support of this motion, the Lawyers' Committee states:

1. Although the attorney for the Petitioners has consented to the filing of the attached proposed brief *amicus curiae*, the attorneys for the Respondents have refused consent.

2. The Lawyers' Committee has represented plaintiffs in numerous actions against police departments and other governmental entities, often in causes that have been viewed as unpopular. Over the past twenty years, hundreds of private attorneys have contributed their services to work on Lawyers' Committee cases filed to eliminate inequities in the law on behalf of the voiceless and dispossessed members of society. The holding of the Seventh Circuit Court of Appeals in this cause trivializes the constitutional rights of both an attorney and her client, and could have a serious chilling effect on the willingness of attorneys to represent clients with unpopular causes. Therefore, the Lawyers' Committee has an essential interest in having this Court grant certiorari to the Petitioners.

3. The Lawyers' Committee believes that this case is of great importance to all citizens of the United States since it presents issues related to basic Fourth and Fourteenth Amendment rights to be secure from unreasonable searches, seizures, and the use of excessive force. In particular, it raises serious issues related to the conflict among the Circuit Courts of Appeals as to the retroactive application of last term's decision in *Graham v. Connor*, 109 S.Ct. 1865 (1989). It also presents the issue of each person's right of access to the courts. These kinds of issues have been the touchstone of the work of the Lawyers' Committee for the past two decades.

4. Because of the national significance of the issues involved in the case and the failure of Petitioners to raise fully the issue of the retroactive application of *Graham*, the Lawyers' Committee feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own parochial interests.

For the foregoing reasons, the Chicago Lawyers' Committee for Civil Rights Under Law requests that the Court grant this motion for leave to file the attached brief *amicus curiae.*

January 4, 1990

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PROPOSED BRIEF OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee for Civil Rights Under Law ("the Lawyers' Committee") is one of eight affiliated civil rights organizations around the country that were formed in the 1960's and 1970's to provide *pro bono* legal representation to people who were being deprived of their

civil rights. Over the past two decades the Lawyers' Committee has represented the interests of Blacks, Hispanics, women, and the disabled in hundreds of cases related to employment discrimination, housing discrimination, equal access to public accommodations, education, and voting rights.

Among those actions have been several major lawsuits against municipalities and police departments for violations of civil rights. The Lawyers' Committee's cases are handled, in large measure, by volunteer attorneys. In this matter, the treatment of both Petitioners as well as the holdings of the Seventh Circuit Court of Appeals that the seizure and force used against attorney Chathas and her client Ellis were within constitutional limits could have a serious chilling effect on the willingness of attorneys to represent clients with unpopular causes. Thus, the Lawyers' Committee, which relies so heavily on the *pro bono* work of attorneys, has an essential interest in having this Court grant certiorari to the Petitioners.

REASONS FOR GRANTING THE WRIT

I.

BY FAILING TO APPLY THE *GRAHAM* STANDARD TO CHATHAS' AND ELLIS' EXCESSIVE FORCE CLAIMS, THE SEVENTH CIRCUIT IGNORED THE LONG ESTABLISHED PRINCIPLE THAT NEWLY-FASHIONED LEGAL RULES SHOULD BE APPLIED TO PENDING CIVIL CLAIMS—A PRINCIPLE THAT SO CLEARLY DICTATES THE RETROACTIVE APPLICATION OF *GRAHAM* THAT EVERY OTHER LOWER COURT CONSIDERING THE ISSUE HAS FOUND IT CONCLUSIVE.

A. The Seventh Circuit's Decision Not To Apply The Fourth Amendment "Reasonableness Test" Of *Graham* To Petitioners' Pending Excessive Force Claims Conflicts With The Holdings Of The Second, Fifth, Eighth, And District Of Columbia Circuits.

Last term in *Graham v. Connor*, 109 S. Ct. 1865 (1989), this Court firmly embraced a uniform framework for excessive force claims brought in the context of "an arrest or investigatory stop, or other 'seizure' of a free citizen." *Id.* at 1871. Distinguishing such claims from those brought by pretrial detainees and prisoners, the Court concluded that all such claims "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.*

Although Petitioners do not directly raise the issue of retroactive application of *Graham* in their petition for certiorari, *amicus* argues that this is a crucial issue that should be considered here. Last term in *Teague v. Lane*, 109 S. Ct. 1060 (1989), this Court recognized the propriety of addressing the question of retroactivity in just this situation, either when an *amicus* brief raises the issue, or when the Court *sua sponte* decides to address it. *Id.* at

1069. *Amicus* respectfully submits that the Court should address the issue of retroactivity here since the Seventh Circuit decision in this case was contrary to well established case law when it failed to apply the holding in *Graham* retroactively.

Prior to the decision in *Graham*, most lower federal courts had endorsed a far less accommodating substantive due process standard. Indeed, the Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits had routinely applied a due process standard to excessive force claims based on police mistreatment during an investigatory stop or seizure. *See* Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 695 n.20. A few other circuits, the Seventh included, initially relied on a due process analysis before adopting a Fourth Amendment "objecti reasonableness" standard. *Compare Lester v. City o hicago*, 830 F.2d 706 (7th Cir. 1987) (excessive force claims should be founded on the Fourth Amendment) *with Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985) (endorsing due process approach).

This near consensus among lower courts ensured that while the pre-*Graham* due process regime held sway, nearly all excessive force claims based on police behavior during an arrest or investigatory stop were subject to the much higher "shocks the conscience" standard. Such claims, in turn, represented a significant proportion of *all* excessive force claims, including those brought by pretrial detainees and prisoners. *See Freyermuth*, 1987 DUKE L.J. at 694-95 (roughly half of all excessive force claims).

In the period that has elapsed since *Graham*, those circuits which had adopted the prevailing due process standard and circuits, like the Seventh, which had only recently rejected such an approach, have had to choose the

proper standard to apply to the pending claims that arose prior to this Court's adoption of the Fourth Amendment standard. In addition to the Seventh Circuit, four other circuits have considered the retroactive application of *Graham*. *See Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989); *Brown v. Glossip*, 878 F.2d 871, 873 (5th Cir. 1989); *Graham v. Davis*, 880 F.2d 1414, 1419 (D.C. Cir. 1989); *Miller v. Lovett*, 879 F.2d 1066, 1069-70 (2d Cir. 1989); *Johnson v. Morel*, 876 F.2d 477, 478 (5th Cir. 1989). With the glaring exception of the Seventh Circuit, in each case the circuit court has applied the holding in *Graham* to pending claims.

The consensus among other circuits notwithstanding, the majority below summarily rejected the retroactive application of *Graham* to Chathas' and Ellis' excessive force claims. Although acknowledging *Graham*'s unequivocal endorsement of a Fourth Amendment analysis, the *Chathas* majority expressly considered and declined to apply *Graham* to Petitioners' excessive force claims. *See Chathas v. Smith*, 884 F.2d 980, 988 (7th Cir. 1989).

Given the split among the circuits and the certainty that this issue will recur with great frequency, granting certiorari in this case would be entirely consistent with the Court's practice of quickly resolving the retroactive force of recently fashioned important constitutional rules. *See, e.g., Brown v. Louisiana*, 447 U.S. 323 (1980) (addressing the retroactivity of *Burch v. Louisiana*, 441 U.S. 130 (1979)); *United States v. Johnson*, 457 U.S. 537 (1982) (addressing retroactivity of *Payton v. New York*, 445 U.S. 573 (1980)); *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (addressing retroactivity issue raised by *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *see generally Johnson*, 457 U.S. at 542 ("Since *Linkletter*, the Court's announcement of a constitutional rule in the realm of criminal procedure has

been followed by a separate decision explaining whether, and to what extent, that rule applies to past, pending, and future cases."). Such a course should be followed here.

B. Under The Court's Three-Part Test In *Chevron Oil*, The Seventh Circuit Erred In Not Applying *Graham*'s Fourth Amendment Standard To Chathas' And Ellis' Excessive Force Claims.

From the time of Chief Justice Marshall, in the vast majority of cases this Court has held that an appellate court should apply the case law governing at the time of appeal even if that case law has changed the law prevailing at the time of trial and at the time of the incidents forming the basis of suit. In cases not involving the imposition of criminal liability, this Court has rarely wavered from the principle of retroactive application of judicial decisions, a principle this Court observed should be "familiar to every law student." *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *see also Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987).

Only in "certain defined circumstances," *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987), have courts employed the three-part test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to limit a rule to prospective application. *See Lund v. Shearson/Lehman/American Express, Inc.*, 852 F.2d 182, 184 (6th Cir. 1988) ("exception to retroactivity" should be construed "narrowly"); *EEOC v. Vucitech*, 842 F.2d 936, 941-42 (7th Cir. 1988) (presumption "strongly in favor of retroactive application"). Under *Chevron*, a court may refuse to apply a newly-decided rule of law retroactively only if the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clear-

ly foreshadowed." 404 U.S. at 106. Even if this threshold requirement were met, a court still would have to "weigh the merits and demerits" of retroactive application, *id.* at 106-107, and "the inequity imposed by retroactive application." *Id.* at 107. Even assuming that *Graham* overruled clearly established precedent, the other two considerations articulated in *Chevron* counsel this Court to uphold the "general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969).

The retroactive application of *Graham* will not produce an inequitable result, and in fact furthers the rationale underlying section 1983: compensating victims of unconstitutional conduct by government officials. This Court has found retroactive application to be inequitable especially when past expectations have been firmly based on bright line rules. Yet such is not the case here. In *Chevron* itself, the Court rejected the retroactive application of a statute of limitations that would have time-barred petitioner's claim. *See Chevron*, 404 U.S. at 108. The Court in *Saint Francis College v. Al-Khazraji*, 107 S. Ct. at 2025, refused to foreclose respondent's section 1981 claim through the retrospective application of a new statute of limitations. In both cases, the party that would have been prejudiced had formed expectations based on an unequivocal prior rule that precisely specified conforming conduct. *See Chevron*, 404 U.S. at 108. As the *Chevron* Court noted, defeating expectations based on less clearly-established prior rules "would not work a comparable hardship." 404 U.S. at 108 n.10.

Such is the case with the *Graham* decision. Retroactive application will impinge on far less well-established expectations. In striking contrast to an obligation to file suit

within a set period of time, the due process standard incorporated only a general proscription against behavior that " 'shocks the conscience.' " *Graham*, 109 S. Ct. at 1870 (citation omitted). Given the amorphous nature of this standard, police departments and law enforcement officers in the field are most unlikely to have been led to believe that the use of force on any given occasion would pass constitutional muster.

Moreover, any expectations that law enforcement officers may have formed about the constitutionality of employing more than the "reasonable" amount of force permitted by *Graham* are illegitimate. The *Graham* Fourth Amendment standard fully accommodates legitimate law enforcement concerns by excusing all uses of force that are reasonable "in light of the facts and circumstances"—a standard that allows for "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving . . . ." *Graham*, 109 S. Ct. at 1872. Unlike the case of the plaintiffs in *Chevron* and *St. Francis Hospital* whose lawsuits would have been foreclosed by the application of the "new" rule, here there can be no legitimate law enforcement rationale for employing more force than that permitted under *Graham*. Retroactive application of *Graham* is entirely consistent with the precept that "an unconstitutional scheme could not be retained . . . even for a brief period if the expectations sought to be protected were themselves unreasonable or illegitimate. . . ." *Heckler v. Mathews*, 465 U.S. 728, 746 (1984).

This Court has recognized that compensating "persons for injuries caused by the deprivation of constitutional rights" is "the basic purpose of a section 1983 damages award." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). This

general principle applies with particular vigor to excessive force claims for which there is no adequate alternative remedy. To allow the Seventh Circuit's decision to stand would be to trivialize the constitutional rights invoked by Petitioners. This Court has acknowledged a duty to " 'resolve all cases . . . on direct review in light of [the Court's] best understanding of governing constitutional principles.' " *United States v. Johnson*, 457 U.S. 537, 555 (1982) (citation omitted). " 'If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced.' " *Id.* Retroactive application of *Graham* would allow a just result.

In sum, the Seventh Circuit's refusal to apply *Graham* retroactively is an indefensible departure from a proper and long-accepted principle. This Court should grant certiorari to correct this error, to resolve the conflict among the Circuit Courts of Appeals, and to provide guidance to other lower courts that will face this issue in the future.

II.

WHEN PETITIONER CHATHAS ENTERED THE COURTHOUSE TO REPRESENT HER CLIENT, RESPONDENTS DEPRIVED HER OF HER FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEIZURE AND EXCESSIVE FORCE BY FORCIBLY LIFTING HER OFF HER FEET AND MOVING HER INTO A DARKENED JURY ROOM.

According to the facts elicited at trial, facts which must be taken in the light most favorable to Petitioners, as Petitioner Chathas entered the courthouse, she and her purse were scanned by a metal detector. When she then

attempted to proceed to the courtroom for her client's hearing, Respondents seized Chathas, lifted her off her feet, carried or dragged her across the rotunda of the courthouse, and deposited her into a darkened jury room. Once in the jury room, Respondents searched her purse and subjected Chathas to a pat down search. Throughout the entire incident, Respondents refused to answer Chathas' requests for information about the reason she was being seized and where Respondents were taking her.

The Fourth Amendment to the United States Constitution protects persons against unreasonable seizures. It is undenied that Chathas was seized. In *Terry v. Ohio*, this Court recognized that the seizure of a person includes *any* conduct that "by means of physical force . . . has in some way restrained the liberty of a citizen." 392 U.S. 1, 19 n.16 (1968). The question here is whether this seizure was reasonable. *Amicus* argues that in light of the surrounding circumstances, the seizure of Chathas was unreasonable and a violation of the Fourth and Fourteenth Amendments. *Tennessee v. Garner*, 417 U.S. 1, 8-9 (1985). First, Chathas was an attorney who had come to the courthouse to represent her client at trial, a trial, it should be noted, in which some of the Respondents were defendants. As an officer of the court, Chathas could have expected to have been and should have been treated with more respect and dignity. Second, having already examined Chathas' person and purse with a metal scanner, Respondents knew that she was not armed. They therefore had no probable cause for seizing and physically moving her to the jury room for a further search. When Chathas repeatedly asked why she was being searched and where she was being taken, Respondents would not even answer. Finally, whatever probable cause Respondents may have had to seize Petitioner Ellis, they had no probable cause to search, seize, or detain Petitioner Chathas. Thus, in light

of the surrounding circumstances, the seizure of Chathas was unreasonable and violated her Fourth Amendment rights. *Graham v. Connor*, 109 S. Ct. 1865 (1989). As Judge Fairchild noted in his dissenting opinion, at the very least, Chathas "made out a prima facie case, of unreasonable seizure of her person in violation of the Fourth Amendment," and the jury should have been allowed to consider the issue. *Chathas v. Smith*, 884 F.2d at 990. Because the granting of the directed verdict motion by the district court was plain error, the Seventh Circuit should have reversed and remanded the case for further proceedings.

The fact that Chathas was an attorney who was at the courthouse to represent her client at a trial that involved some of the Respondents emphasizes the egregious nature of the Respondents' conduct. *Amicus* urges this Court to grant the petition for writ of certiorari in order that such unreasonable searches and seizures of attorneys will not go unredressed. To allow such conduct could inhibit the filing of nonfrivolous cases against governmental agencies and law enforcement officers. Thus, this case has significant implications for all attorneys, particularly for public interest and civil rights attorneys.

In addition to challenging the unreasonableness of her seizure under the Fourth and Fourteenth Amendments, Chathas claimed that her seizure was effectuated with excessive force. This Court recently held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." *Graham v. Connor*, 109 S. Ct. at 1871 (emphasis in original). As was noted above in the first section, it is a well-settled principle that with few exceptions,

a circuit court of appeals should apply the decisions of this Court, even decisions rendered during the time intervening between the judgment of the trial court and the consideration of the case by the appellate court. In accordance with this principle, several Circuit Courts of Appeals have applied *Graham* in cases similar to this one. In *Miller v. Lovett*, the Second Circuit held, "In light of *Graham*, [decided four days before *Miller* was argued to the circuit court], it was plain error to charge the jury under the old . . . standard for evaluating excessive force claims . . . ." 879 F.2d 1066, 1070 (2d Cir. 1989). Such should have been the case here as well.

However, the United States Court of Appeals for the Seventh Circuit refused to apply this Court's holding in *Graham*. While noting *Graham*, the Seventh Circuit affirmed the district court's use of a very different standard. Further, the Seventh Circuit's opinion is internally inconsistent. The court appears to suggest that since the *Graham* decision was decided after the Respondents' use of excessive force, the conduct must be measured against the standard that was in place at the time. However, the standard that the district court used (the more stringent test adopted in *Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985)) had itself not been decided at the time of the Respondents' conduct. In sum, the Seventh Circuit's decision is contrary to the decision of this Court in *Graham* which should have been controlling and applied in this case.

Finally, this Court withheld its consideration of the "proper application" of qualified immunity claims "in excessive force cases that arise under the Fourth Amendment" in *Graham*. 109 S. Ct. at 1873 n.12. *Amicus* urges this Court to grant the petition for writ of certiorari and take the opportunity this case affords to address that issue.

III.

RESPONDENTS DEPRIVED PETITIONER ELLIS OF HIS FOURTEENTH AMENDMENT RIGHT OF ACCESS TO THE COURTS AND HIS FOURTH AND FOURTEENTH AMENDMENT RIGHT AGAINST EXCESSIVE FORCE BY PHYSICALLY ASSAULTING HIM WITHOUT CAUSE, FORCIBLY HOLDING HIM IN A JURY ROOM, AND PREVENTING HIM FROM APPEARING AT A SCHEDULED HEARING.

Access to the courts is a hallmark of this nation's justice system and is guaranteed by the Due Process Clause of the Fourteenth Amendment. As the Seventh Circuit itself noted, "To deny such access defendants need not literally bar the courthouse door . . . ." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984). Here, that is exactly what Respondents did; they effectively barred the courthouse door. But in this case the Seventh Circuit held that because Petitioner Ellis eventually won the case for which he was at the courthouse the day Respondents deprived him of his constitutional rights, he was not "prejudiced" by the deprivation and, therefore, had no right to any redress.

Bell involved a claim by a decedent's family and estate against defendant police officers who concealed the facts surrounding decedent's death. If one applied the Seventh Circuit's analysis in the instant case to the facts in *Bell*, the plaintiffs would have had no claim because they ultimately found out that defendants were concealing facts and successfully sued the defendants. However, there, the Seventh Circuit held that the mere concealment of material facts by the defendants was a violation of the plaintiffs' constitutional due process right of access to the courts. Here, Respondents did not conceal facts, but attempted to "conceal" Petitioner and actually prevented him from appearing in court that day. Such conduct con-

stituted a violation of Petitioner's due process right of access to the courts.

Respondents also violated Ellis' constitutional right against excessive force. Assuming *arguendo* that Respondents had probable cause to seize Ellis, the question remains whether that seizure was effected with excessive force. As stated above, the excessive force claim should have been analyzed under the *Graham* reasonableness standard. While ultimately such question is a question of fact to be decided by a jury, and should have been allowed to go to the jury in this case, *amicus* supports Petitioners' claim that the force used to effectuate the seizure was excessive.

First, after scanning Ellis with the metal scanner and searching his briefcase, Respondents knew that he was unarmed. Second, without giving either Chathas or Ellis an explanation, Respondents carried or dragged away Ellis' attorney and then physically assaulted Ellis as he tried to make his way to the courtroom in which his hearing was to be held. Third, Ellis was exhibiting no unusual or violent behavior, nothing that would give cause for alarm or call for the beating that he received at the hands of Respondents. Fourth, Respondents refused to give Ellis an explanation or reason for the seizure or to state whether he was under arrest. Fifth, Respondent Cainkar, an attorney acknowledged that Ellis' constitutional rights were being violated. Cainkar repeatedly stated that he did not care whether he was violating Ellis' civil rights, and that he did not give a "damn" about the law. *See* Petition at 8. Such utter disregard for constitutional rights should not go unredressed.

Again, *amicus* emphasizes that this Court need not decide the issue of whether Respondents' treatment of Petitioner Ellis was violative of the Fourth Amendment. Since under the reasonableness standard, Petitioner Ellis made

out a prima facie case and the issue should have been allowed to go to the jury. *See Chathas v. Smith*, 884 F.2d at 990 ("Ellis sufficiently made out a *prima facie* case that he was subjected to excessive force by the defendants he identified.") (Fairchild, J., dissenting). Because this case represents such a departure from the accepted and proper judicial proceedings with regard to the granting of a motion for directed verdict, this Court should grant the petition for certiorari and remand the case for a new trial. If this Court allows the circuit courts of appeals to act as judge and jury, the right to a jury of one's peers becomes a hollow one.

CONCLUSION

For these various reasons, particularly the conflict among the circuits on the retroactive application of *Graham*, *amicus* submits that the petition for certiorari should be granted.

January 4, 1990

Respectfully submitted,

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